

2001

# Gerald M. Butler v. Sports Haven International : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

*14750A*

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

GERALD M. BUTLER,

Plaintiff-Appellant,

vs.

SPORTS HAVEN INTERNATIONAL,

Defendant-Respondent.

)  
)  
) Case No.  
)  
) 14750  
)  
)  
)

BRIEF OF APPELLANT

APPEAL FROM THE ORDER OF THE THIRD JUDICIAL  
DISTRICT COURT, THE HONORABLE MARCELLUS K. SNOW  
JUDGE PRESIDING, GRANTING RESPONDENT'S MOTION  
FOR SUMMARY JUDGMENT.

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**FILED**

NOV 5 - 1976

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Clerk, Supreme Court, Utah

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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GERALD M. BUTLER,

Plaintiff-Appellant,

Case No.

vs.

14750

SPORTS HAVEN INTERNATIONAL,

Defendant-Respondent.

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the order of the Third Judicial District Court, the Honorable Marcellus K. Snow, Judge Presiding, granting the Respondent's Motion for Summary Judgment.

DISPOSITION IN THE LOWER COURT

Appellant filed a complaint against Respondent for the wrongful death of Appellant's three-year-old son who drowned in a swimming pool operated by Respondent, alleging that Respondent was negligent in the operation of the swimming pool. Respondent moved for an Order granting Summary Judgment in its favor and the Honorable

Marcellus K. Snow subsequently granted Respondent's Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Order granting Respondent's Motion for Summary Judgment.

STATEMENT OF THE FACTS

Appellant filed a complaint in May of 1975 against Respondent for the wrongful death of Appellant's three-year-old son who drowned on July 18, 1973, in a swimming pool maintained and operated by the Respondent, the thrust of Appellant's complaint being that the Respondent was negligent in the operation of said swimming pool.

Respondent is a non-profit organization that maintains recreational facilities and property, including the subject swimming pool, near Fairview, Utah, in Sanpete County.

Appellant became a member of Respondent Sports Haven International in 1970, when he purchased a one-acre parcel of Sports Haven International property. (Appellant's deposition, pages 17, 21) As members, the Appellant and his family were free to develop their own one acre parcel of property and were entitled to use common facilities, including the clubhouse and the subject swimming pool. (Appellant's deposition, page 18)

On July 18,,1973, the Appellant, his wife, their five children and two guests, were staying in Appellant's trailer which was parked approximately 100 yards from the swimming pool. (Appellant's deposition, pages 26, 27)

The swimming pool and dressing facilities were enclosed with a chain link fence and were accessible only through a gate at the southeast corner. (Appellant's deposition, pages 19, 39; Affidavit of Wendell A. Davis) The latch on the gate into the swimming pool area was broken and would not latch and Wendell A. Davis, President of Respondent Sports Haven International at the time, knew this. (Appellant's deposition, page 40) . No lifeguard was present in the swimming pool area and a sign was posted on the premises advising members of that fact and that children under the age of 14 were not to use the swimming pool without an adult in attendance. (Affidavit of Wendell A. Davis)

On the afternoon of July 18, 1973, Appellant's wife accompanied their children and guests to the swimming pool and watched the smaller ones while they played in the pool. (Appellant's deposition, page 24) The Appellant devoted the afternoon to repairing the refrigerator in the trailer. (Appellant's deposition, page 26) Sometime later, Appellant's wife took three-year-old

Gerald M. Butler, Jr., and their six-year-old daughter back to the trailer where they dressed and Appellant's wife began cooking dinner. (Appellant's deposition, page 27)

At approximately 7:00 p.m., after the family had eaten and rested for a period of time, the older daughters of Appellant and his wife, ranging in age from 10 to 15 years, decided to return to the pool. (Appellant's deposition, pages 28, 29) Gerald, Jr., and his sister, Susie, wandered off to play together on the swings located in a separate area 50-75 yards from the enclosed pool area. (Appellant's deposition, page 30) The Appellant returned to his work on the refrigerator while his wife did the dishes. (Appellant's deposition, page 30)

After approximately 15 minutes, Susie returned without Gerald, Jr., who, she reported to her mother, had decided to stay at the swings a while longer. (Appellant's deposition, pages 31, 32) Not long afterwards, the older children had gotten out of the pool and had retrieved their towels from the dressing room when the Appellant's wife "...hollered down to them and asked them if Chuckie (Gerald M. Butler, Jr.) was with them and they said, 'No.'." (Appellant's deposition, page 31) The older children returned to the trailer and approximately 10 to



15 minutes elapsed when the Appellant and his wife began to get concerned about Gerald, Jr. (Appellant's deposition, page 33)

Approximately 10 to 15 minutes after the older children had left the swimming pool area and returned to the trailer, the Appellant and his family began searching for Gerald, Jr. (Appellant's deposition, page 33)

The Appellant went immediately to the swimming pool and made a visual inspection of the bottom of the pool, but, unknown to him at that time, it was impossible to see all the way to the bottom of the swimming pool because of the murkiness of the water. (Appellant's deposition, pages 34, 35) After searching unsuccessfully for Gerald, Jr., in the surrounding areas, Appellant returned to the swimming pool, this time accompanied by Wendell A. Davis, at that time the President of Respondent Sports Haven International. As the Appellant and Mr. Davis were looking into the water of the swimming pool, they saw Gerald, Jr.'s shirt begin to float up out of the murkiness of the water on the bottom on the pool. The Appellant then dove into the swimming pool, where he found the body of Gerald, Jr., lying on the bottom and subsequent efforts to revive him failed. (Appellant's deposition, pages 34, 35)

## ARGUMENT

## POINT I.

THE COURT BELOW ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT BECAUSE THE QUESTION OF WHETHER RESPONDENT WAS NEGLIGENT IS A MATERIAL ISSUE OF FACT UNDER UTAH LAW.

The law in the State of Utah is clear as to when Summary Judgment is an appropriate order. In HOLBROOK COMPANY v. ADAMS, 542 P.2d 191, 193 (1975), the Utah Supreme Court reiterated its long held position that only "...when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail...is the Court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views." and that "Conversely, if there is any dispute as to any issue, material to the settlement of the controversy, the Summary Judgment should not be granted." The Court states that the burden of showing that an issue of fact exists which is sufficient to preclude the granting of a Summary Judgment is met if there is even "...one sworn statement under oath to dispute the averments on the other side of the controversy [which] create[s] an issue of fact."

In the present case, the broken latch on the gate leading into the swimming pool area, in violation of safety recommendations promulgated by the Utah State Division of Health and the murkiness of the water in the bottom of the swimming pool which precluded a visual inspection of the bottom of the swimming pool are both clearly factors which go to the question of whether Respondent was negligent in meeting the required standard of reasonable care in maintaining and operating a swimming pool.

Although the Utah Supreme Court has not considered the precise issue, the United States Court of Appeals for the Tenth Circuit affirmed the lower court's finding that where water in a swimming pool was so murky that one could not see below three feet of water, the operators of the pool were actionably negligent. BURGERT v. TIETJENS, 499 F.2d 1 (1974).

The position of the Utah Supreme Court on the question of negligence as an issue of fact is clear and consistent. In YOSHITARO OKUDA v. ROSE, 5 Utah 2d 39, 296 P.2d 287, 289 (1956), the Court, citing LINDEN v. ANCHOR MIN. CO., 20 Utah 134, 58 P. 355, stated that, "Whenever there is uncertainty as to the existence of negligence or contributory negligence, the question is one of fact to be settled by a jury, regardless of whether

the uncertainty occurs because of a conflict of evidence or because from the facts men might honestly draw different conclusions." In WEBB v. OLIN MATHIESON CHEMICAL CORPORATION, 9 Utah 2d 275, 342 P.2d 1094, 1101 (1959), the Court reiterated its position, quoting Justice Frick in NEWTON v. O.S.L.R. CO., 43 Utah 219, 134 P. 567, 570:

"...[U]nless the question of negligence is free from doubt, the Court cannot pass upon it as a question of law;...if... the Court is in doubt whether reasonable men,...might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court." In WEBB, the Court elaborated on its position in stating that "It is the declared policy of this court to zealously protect the right of trial by jury and not to take issues from them and rule as a matter of law except in clear cases."

In WHEELER v. JONES, 19 Utah 2d 392, 431 P.2d 985, 987 (1967), the Utah Supreme Court stated the generally accepted rule with reference to the standard of care required in negligence cases where children are involved as follows: "There is a greater duty imposed by law upon an occupier of land to use care for the safety of his guests, when those guests are children of tender years, than there is when they are mature people."

And, in negligence cases where children are involved, as in the present case, the Utah Supreme Court, in WHEELER, has spoken clearly with respect to the question of negligence as an issue of fact within the province of the jury:

Negligence is the breach of a duty to use due care under the circumstances of the situation. When Children are involved, the duty to look out for their safety is increased, and failure to make a given discovery might be negligence when children are involved and not negligence if adults only are affected. It is a relative thing and generally must be left to the jury to say if under all the circumstances the conduct of the actor measures up to the standards of a reasonably prudent man.

In the present case, the broken latch on the gate leading into the swimming pool area in violation of safety recommendations promulgated by the Utah State Division of Health and the fact that the water in the bottom of the swimming pool was so murky that it precluded a visual inspection of the bottom of the pool, which fact alone was sufficient to justify a finding that the operators of a pool were actionably negligent in BURGERT, are both clearly factors that, taken individually or together, go to the question of whether the Respondent was negligent in meeting the required standard of reasonable care in operating

and maintaining a swimming pool and, under Utah law, the question of whether Respondent was negligent in meeting the required standard of reasonable care is clearly an issue of fact to be decided by a trier of fact, particularly in view of the Court's position on the question of negligence when children are involved, as set forth in

WHEELER.

The Respondent has relied upon the doctrine set forth in TREMELLING v. SOUTHERN PAC. CO., 51 Utah 189, 170 P. 80 (1917), which provides that where the jury must speculate as to which of two causes is the proximate cause of the Plaintiff's injury, the Plaintiff must fail in his action.

With reference to the question of whether Respondent was negligent in meeting the required standard of reasonable care in operating a swimming pool by virtue of the murky condition of the water in the bottom of the pool and the resultant preclusion of any visual inspection of the bottom of the pool for a missing child, the Tremelling doctrine simply does not apply, nor has Respondent ever asserted that it does.

With reference to the question of whether Respondent was negligent in meeting the required standard of reasonable care in operating a swimming pool by virtue

of the broken latch on the gate leading into the swimming pool, the facts in the present case are distinguishable from those existing in Tremelling. In that case, the jury would have been required to speculate as to which of two equally probable causes, in only one of which was negligence a factor, was the cause of Plaintiff's death. In the present case, there is a prior and continuing act of negligence on the part of the Respondent (allowing the latch on the gate to remain broken) which a jury would not be required to speculate about and which negligent act foreordained that, even though the last person through the gate had done everything possible to secure the gate against the intrusion of unknown youngsters of tender years, any three- or four-year-old child who was so inclined could have pushed the gate open, entered the swimming pool area, and, in a swimming pool such as the one in the present case where no life guard was provided, unobservedly fallen into the swimming pool and drowned. This is precisely what occurred in the present case and it is clear that no speculation or conjecture would be required on the part of the jury to reach this conclusion.

In TREMELLING, there were two possible acts which could have caused death, a fall (no negligence) and the striking of a negligently placed train car (negligence).

This Court would not allow a jury to speculate as to which act caused the death. In the present case such a possibility of speculation does not exist. The Butler child drowned because of two independent acts of negligence on the part of Respondent, 1) a gate which could not be locked to preclude the child's entry; and 2) a pool so murky his presence in the pool could not be detected. Respondent's argument that a party or parties unknown left the gate open goes to the question of intervening cause and not to the issue of speculation by the jury. The burden is on Respondent to show intervening cause as a factual defense and is a question of fact for the jury. The burden is not upon the Appellant to rule out all possible defenses, but upon Respondent to prove its defenses.

Further, it is universally agreed that the mere fact that the intervention of a responsible third party can be traced between the Defendant's wrongful act and the death will not absolve the Defendant of liability. The intervening act of a third party may be such as to render both liable. Also, a Defendant is not relieved from liability by the fact that the direct and immediate cause of injury was the act of a third person, where the Defendant is duty bound to protect the Plaintiff against the injury from that source. See 57 AM JUR 2d Negligence, § 193.



In PETERSON v. SALT RIVER PROJECT AGR. IMP. & POW. DIST., 96 Ariz. 1, 391 P.2d 567, 569 (1964), the Supreme Court of Arizona's position with reference to the viewing of evidence in a negligence case upon appeal from a directed verdict was stated as follows: "In viewing the evidence to determine whether it is such that reasonable men might conclude the fact of negligence, such evidence must be viewed in a light most favorable to him who urges that it be submitted to the jury as against the party who urges that no jury question has been presented."

The Utah Supreme Court has taken this same position, as evidenced by the language in HOLBROOK COMPANY v. ADAMS, supra, at 193, that only "...when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail...is the Court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views."

Appellant submits that, in viewing the evidence in a negligence case upon appeal from an Order for Summary Judgment in favor of the Defendant-Respondent, fairness and justice dictate that the rule adopted by the Supreme Court of Arizona is the rule that should be adopted by this Court and the Appellant so urges the Court.

## CONCLUSION

For the reasons above stated, Appellant respectfully submits that the Order of the Third Judicial District Court granting Respondent's Motion for Summary Judgment should be reversed and the case remanded for trial.

Respectfully submitted,

LAMBERTUS JANSEN

Attorney for Appellant