IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHAN YOUNG LEE, a minor, by his Parents and Next Friends, BO HYUN LEE and WAN KI KIM, a minor, by his parents and Next Friends, BO HYUN LEE and WAN KI KIM,	:	
Plaintiffs,	:	
	:	C. A. No. 02C-10-280 (CHT)
v.	:	
CHOICE HOTELS INTERNATIONAL, INC., a Delaware Corporation, d/b/a QUALITY INNS AND RESORTS,	:	
Defendant/Third-Party Plaintiff	:	
v.	:	
P.T. MARINA CITY DEVELOPMENT, an Indonesian Corporation and P.T. QUALITA INDAH HOTELS, an Indonesian Corporation	:	
Third-Party Defendants.	:	

OPINION

On Defendant's Motion for Summary Judgment

Submitted: May 12, 2008
Decided: June 5, 2009

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TOLIVER, JUDGE

Presently under consideration is Defendant Choice Hotels International Inc.'s motion for summary judgment which was filed on April 15, 2005. The motion, as subsequently amended after certain rulings by the Court, seeks the entry of judgment in favor of Choice in response to the claims brought by the Plaintiffs, the parents of Chan Young Lee, individually and on behalf of their son, for injuries he suffered at one of the Choice hotels in Indonesia. That which follows is the Court's response to the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

Background

As noted in previous decisions issued in this case, the instant controversy began when Bo Hyun Lee and Wan Ki Kim, along with their sons, Young Min Lee and Chan Young Lee, left their home in Seoul, South Korea on May 4, 2001 to enjoy a vacation tour of Southeast Asia. Their journey ended on May 6, 2001, when Chan Young nearly drowned while playing in the swimming pool at the Quality

Resort Waterfront City in Batam, Indonesia.[1] The complaint initiating this litigation was filed on October 30, 2002 and amended on January 30, 2003.

The gravamen of the Plaintiffs' complaint against Choice may be reduced to five categories: (1) the failure to provide lifeguards; (2) the failure to post written warnings that no lifeguards were present or otherwise provide that information directly to the Plaintiffs; (3) the improper design of the pool where Chan Young Lee was injured; (4) the failure to properly train and supervise franchise employees; and (5) the failure to provide safety measures which would allow a response to the emergency that occurred on May 1, 2001. These allegations, the Plaintiffs contend, constitute negligence, negligence *per se* and a breach of an implied warranty of safety or fitness.

[1] The facts are more particularly described in the opinion and order filed by the Court in response to the Defendant's motion to strike Thomas C. Ebro dated March 24, 2006. *Lee v. Choice Hotels International, Inc.*, 2006 WL 1148752 (Del. Super. Ct. Mar. 24, 2006). The statement of the facts here will be limited to those relevant to the instant motion.

Procedural Posture

Both sides have filed a number of motions in an effort to narrow the issues to be resolved, but for different reasons. Of critical import for present purposes are the motions to determine the law to be applied and relating to the use of expert testimony as well as the responses thereto.

In this regard, on March 21, 2006, this Court, following submission of authorities and argument from the parties, issued an order which declared that Indonesian law would be applied to this case.[2] Shortly after that decision, the Plaintiffs filed a notice of intent to rely on foreign law.[3]

On March 24, 2006 the Court granted Defendant's motion to strike Mr. Ebro's proposed testimony based upon Delaware Rule of Evidence 702[4] and decisions announced by

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[2] *Lee v. Choice Hotels International, Inc.*, 2006 WL 1148737 (Del. Super. Ct. Mar. 21, 2006).

[3] Pl.'s Notice of Intent to Rely on Foreign Law, *Lee v. Choice Hotels International, Inc.*, Docket 134 (Del. Super. Ct. Mar. 31, 2006).

[4] The Delaware Rules of Evidence shall hereinafter be referenced as "DRE ___".

the Delaware Supreme Court adopting the rule of law announced in *Daubert v. Merrill Dow Pharmaceuticals*.[5] The Plaintiffs proffered Mr. Ebro as an expert witness in "aquatic safety." Mr. Ebro was to testify, among other subjects, as to the international standard of care applicable to the design, operation and maintenance of resort hotel pools in Indonesia like the one at issue. That standard of care was, according to Mr. Ebro, embodied in guidelines promulgated by ANSI/NPSI and adopted worldwide, including by Choice in its franchise agreements with its affiliate resorts and/or hotels.[6] The Court decided that Mr. Ebro's testimony did not qualify

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[5] 509 U.S. 519 (1993); *Goodridge v. Hyster Co.*, 845 A.2d 498 (Del. 2004); *Eskin v. Carden*, 842 A.2d 1222 (Del. 2004); *Cunningham v. McDonald*, 689 A.2d 1190 (Del. 1997); *Nelson v. State*, 628 A.2d 69 (Del. 1993).

[6] ANSI/NPSI is an acronym which stands for the American National Standards Institute/National Spa and Pool Institute. As noted by this Court in its discussion relative to Mr. Ebro:

> . . . ANSI/NPSI is an umbrella group consisting of commercial organizations worldwide involved in the pool industry. As part of its role, the group sets guidelines for pool operation and safety which are alleged to be international in scope as well as application. . . .

Lee, 2006 WL 1148752 at *2.

as expert testimony for purposes of DRE 702 for several reasons, including the Court's determination that the methodology employed and the opinions provided as a result, were unreliable. It could not as a consequence be presented to a jury to establish to the existence or definition of such a standard or any alleged breach thereof.[7]

The Plaintiffs filed a motion for reconsideration and/or reargument of the Court's decision relative to Mr. Ebro on March 27, 2006. Four days later, on March 31, 2006, the Plaintiffs filed a motion seeking leave to designate a substitute liability expert. On September 19, 2006, the Plaintiffs identified H. Hendri Johni, S.P.T., an Indonesian engineer and proposed expert on swimming pool design and construction in place of Mr. Ebro. His opinions mirrored those proffered by Mr. Ebro.

In support of their motion to reargue and motion to designate a substitute liability expert, the Plaintiffs offered the declarations of Andrew I. Sriro, Esquire on

[7] *Id.* at *5-7.

September 26 and October 10, 2006, as to the viability of Regulation 061[8] as a part of Indonesian law and the applicable standard of care as well as any causes of action arising therefrom or related to other laws of that country. Those affirmations indicate that Mr. Sriro was licensed to practice law in the State of California and the Republic of Indonesia. He appears to have had substantial experience in corporate matters as well as with commercial transactions and litigation. It further appears that Mr. Sriro is employed as an attorney and "foreign advocate" for an international law firm based in Jakarta, Indonesia, and authored several publications dealing with various aspects of Indonesian law.

The Plaintiffs' motion for reconsideration and/or reargument of the order striking Mr. Ebro's testimony was denied on September 19, 2007.[9] On October 1, 2007, the

[8] Regulation 061 consists of two parts, the main body and an attachment. For purposes of the motion being considered, they shall be referenced as a single document unless otherwise noted.

[9] Opinion and Order on Pl.'s Motion for Reconsideration and/or Reargument, *Lee v. Choice Hotels International, Inc.*, Docket 179 (Del. Super. Ct. Sep. 19, 2007). It was in this opinion the Court rejected the Plaintiffs' argument that the franchise agreements between Choice and the owners of the Waterfront City resort incorporating the ANSI/NPSI guidelines thereby established

motion for leave to designate a substitute liability expert was denied.[10] Mr. Johni, stated the Court, was not an expert on aquatic safety, but a civil engineer who designs pools and manages their construction. Thus, he would provide expert testimony in a different area than Mr. Ebro. The decision also took note of the fact that Mr. Johni was available and known to counsel for the Plaintiffs at or near the beginning of the instant litigation.

Issues To Be Addressed by Choice's Summary Judgment Motion

Choice originally filed this motion for summary judgment on April 15, 2005.[11] The Plaintiffs responded to that motion on May 6, 2005. Before addressing the issues

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the standard of care based upon that body of information. As a result, there is no need to address that argument any further here. *Id*. at 7-9.

[10] Opinion and Order on Pl.'s Motion for Leave to Designate Substitute Liability Expert, *Lee v. Choice Hotels International, Inc.*, Docket 180 (Del. Super. Ct. Oct. 1, 2007).

[11] Choice asserted several grounds in support of that motion. These include, but are not limited to, the assertion that Choice was not a proper defendant, Plaintiffs were advised there was no lifeguard on duty and the inapplicability of the doctrines of apparent authority and attractive nuisance.

so raised, the Court turned first to the above-referenced motions regarding where the trial was to take place, the law to be applied and whether Mr. Ebro would be allowed to testify as an expert on behalf of the Plaintiffs. Once those rulings were issued, Choice supplemented its motion for summary judgment on June 16, 2006.[12] The Plaintiffs filed a response to Choice's supplement on October 15, 2007.[13] Finally, Choice filed another memorandum in support of its motion on November 7, 2007 to which the Plaintiffs filed a rejoinder on March 20, 2008.

The essence of the Defendant's argument is that

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[12] Choice was given the opportunity to supplement its motion for summary judgment after the Court held that Mr. Ebro was not qualified to testify as an expert regarding the applicable standard of care.

[13] Although it was not formally pled in the initial complaint or its subsequent amendment, the Plaintiffs have argued through the declarations of Mr. Sriro that there is an implied warranty of fitness or safety which Choice breached in the manner in which it ran the swimming pool at Waterfront City. Also not pled is the claim that the Plaintiffs now appear to be advancing as well based upon Regulation 061 and the attachment thereto, i.e., that Choice by virtue of the same conduct, was negligent *per se*. Nonetheless, the Court will consider them as if they had been so pled or that the pleadings had been so amended to conform to the evidence, at least as the Plaintiffs see it. The Court further notes that the conduct complained about and/or the standard to which Choice failed to adhere, in any event, are the same.

before the specifics of the Plaintiffs' complaint are addressed, there must be a determination of the standard of care applicable to the operation, design and maintenance of the swimming pool at the Waterfront City resort.[14] The Defendant must therefore establish that there is no material dispute of fact and that the Defendant is entitled to the entry of judgment as a matter of law as to the existence and definition of the applicable standard. It must do so while the Court, as previously stated, views the evidence most favorably to the nonmoving parties, which in this case are the Plaintiffs.

With regard to the Plaintiffs' claims that it was negligent, Choice argues first that expert testimony is required to establish the standard of care and its breach in these circumstances. And, as a result of the decision to strike Mr. Ebro's testimony and the subsequent refusal by this Court to allow the Plaintiffs to substitute that

[14] Although Choice does not concede that it owed a duty of care to the Plaintiffs in designing, operating or maintaining of its Waterfront City resort swimming pool, the Court assumes that duty does exist for purposes of addressing the substance of the pending motion.

proffered by Mr. Johni in its place, none exists, which is fatal to the Plaintiffs' case. Choice goes on to contend that even if no expert testimony is required, the Plaintiffs have not established the applicable standard of care, given the record in this case. Lastly, Choice argues that the Plaintiffs have failed to establish that Choice breached any standard of care which might be said to exist or that any such breach proximately caused injury to Chan Young Lee.

As to the Plaintiffs' claims that Choice breached an implied warranty of safety or fitness in this case, Choice's response is twofold. It contends that expert testimony is again required to establish such an obligation and that the absence thereof is fatal to the Plaintiffs' cause of action in this regard. Choice goes on to argue that regardless of whether expert testimony is required, the record fails to reveal any basis upon which a jury could conclude that such a warranty existed or that it had been breached by Choice on May 6, 2001.

The Plaintiffs have raised several arguments in their opposition to the motion filed by Choice. They contend

in the first instance that they have established the applicable standard of care based upon Regulation 061 and the testimony of Mr. Sriro. No expert testimony is required given the subject matter.[15] To the extent that any expert testimony is required, the Plaintiffs contend that it is provided by Mr. Sriro relative to Regulation 061. They also argue that no expert testimony is necessary because Regulation 061 represents the law of Indonesia governing the operation of public pools. Consequently, it constitutes the applicable standard of care and any breach thereof must be deemed negligent *per se*. Finally, Regulation 061 also serves as the basis, along with the provisions of the Indonesian Civil Code cited by Mr. Sriro, for the implied warranty referenced above that the Plaintiffs claim was breached.

It is in light of these arguments that the Court will

[15] A jury, the Plaintiffs specifically argue, is competent to determine that a family-oriented resort hotel with a swimming pool with an unmarked deep water trench in the shallow end is negligent. Nor is it necessary to offer expert testimony to establish proximate cause given the circumstances of the injuries suffered by Chan Young.

address the motion filed by Choice.[16]

DISCUSSION

Standard of Review - Generally

The Court will grant a motion for summary judgment

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[16] The Court notes that in its final submission, Choice contends, among other things, that the Plaintiffs violated this Court's previous order regarding the supplementation of the record as it related to Choice's summary judgment motion by submitting additional affidavits of Young Min Lee, Bo Hyun Lee and Mr. Ebro on October 18, 2007. Notice of Lodging of the Original Affidavit of Bo Hyun Lee, *Lee v. Choice Hotels International, Inc.*, Docket 189 (Del. Super. Ct. Oct. 18, 2007); Notice of Lodging of the Original Affidavit of Thomas C. Ebro, *Lee v. Choice Hotels International, Inc.* Docket 190 (Del. Super. Ct. Oct. 18, 2007); Notice of Lodging of the Original Affidavit of Young Min Lee, *Lee v. Choice Hotels International, Inc.*, Docket 191 (Del. Super. Ct. Oct. 18, 2007); *see* Transcript from Teleconference, *Lee v. Choice Hotels International, Inc.*, Docket 181 at 26 (Del. Super. Ct. Oct. 10, 2007) (holding that the above-mentioned affidavits would not be considered by the Court in deciding motion for summary judgment). Choice also argues that Mr. Sriro was not identified by the deadline imposed by the Court and that his testimony is therefore inadmissible regarding the standard of care

The Plaintiffs's terminal submission counters first with the argument that the affidavits in question were only submitted for future appellate review and that there was no violation of any court order as a result. In addition to reiterating other positions previously taken, they contend that Mr. Sriro is being put forth as an authority on foreign law and that the Plaintiffs have complied with the procedures necessary to establish the existence as well as the applicability the provisions of foreign law relevant to the instant dispute.

To the extent relevant and necessary to the disposition of the pending motion, these arguments will be addressed *infra*.

when, in viewing the record in the light most favorable to the nonmoving party, the movant has shown that there are no material issues of fact and that the movant is entitled to judgment as a matter of law.[17] The moving party bears the initial burden of proving that no such issues exist.[18] Once that burden is satisfied, the non-moving party must establish that disputed material issues of fact do indeed remain.[19] The facts must be viewed most favorably to the nonmoving party.

When the burden shifts to the nonmoving party:

> [T]he nonmoving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. If material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.

However, if there is but one reasonable interpretation,

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[17] Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[18] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[19] *Albu Trading, Inc. v. Allen Family Foods*, 829 A.2d 141 (Del. 2003) (citing *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

summary judgment is appropriate.[20] Disposing of litigation via summary judgment is encouraged, when possible, to expeditiously and economically resolve lawsuits.[21]

Negligence

As noted above, this action is primarily based upon the alleged failures by Choice to operate the Quality Resort Waterfront City resort and pool in a safe manner. Those failures, the Plaintiffs contend, resulted in the injuries suffered by Young Min Lee on May 6, 2001. In short, the Plaintiffs are primarily arguing that Choice was negligent in the operation of the facility in question.

Negligence is the failure of one person or entity to meet a duty of care owed another which results in injury or loss to the latter.[22] It obviously requires a

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[20] *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334 (Del. Super. Ct. 1973); *Shultz v. Delaware Trust Co.*, 360 A.2d 576 (Del. Super. Ct. 1976).

[21] *Davis v. University of Del.*, 240 A.2d 583 (Del. 1968).

[22] *Campbell v. DiSabatino*, 947 A.2d 1116, 1117 (Del. 2008).

threshold determination that such a duty exists. A plaintiff must demonstrate that the relationship between the parties resulted in a legal obligation owed to the Defendant.[23] Once that is established, the court must determine if the conduct being complained about conforms to that duty. If the answer is affirmative then the inquiry need go no further. If it is negative, the plaintiff must establish that he or she was injured as a proximate result of the aforementioned conduct.

There is a distinction to be drawn between the duty of care and the conduct being measured against it in determining whether one is legally responsible for his acts or omissions toward another, i.e., the standard of care. As the Court in *Brandt v. Rokeby Realty Co.* stated, Delaware courts have recognized that:

> [i]t is better to reserve 'duty' for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other, and to deal with particular conduct in terms of a legal standard of what is required to meet the obligation
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> . . .

[23] *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 23 (Del. 2009).

> . . . The distinction between the duty to prevent harm and how that is to be measured is well established. Duty establishes the obligation; the conduct is evaluated by a legal standard of what is necessary to satisfy the obligation. [Citations omitted.][24]

Although not precisely stated, the duty the Plaintiffs seek to enforce is that of a landowner who invites others to attend his property for business purposes. The landowner is not an insurer of the safety of those so invited but is required to keep the premises in a reasonably safe condition for that use. The attendant standard of such a landowner is that of a reasonably prudent person under the circumstances.[25] What it takes to conform to that standard depends upon the peculiar facts of each case. However in some cases, the standard of care is defined by a statute and a violation thereof constitutes negligence *per se*.[26]

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[24] 2004 WL 2050519 at *2 (Del. Super. Ct. Sep. 8, 2004).

[25] *Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 244-45 (Del. 1961).

[26] *Toll Bros., Inc. v. Considine*, 706 A.2d 493, 495 (Del. 1998).

A. Character of Evidence Necessary to Establish the Standard of Care

In order to establish the standard of care, the Court, as noted above, must look to the circumstances of each case. Generally speaking, where the facts can be adequately presented to the jury and are of such a nature that ordinary men can understand them, expert testimony is not required or admissible to establish the standard of care.[27] Conversely, expert testimony is relevant and necessary when the understanding and analysis of the issues are beyond the ken of the typical jury.[28] When the circumstances are not so clear as to lead to the conclusion that they are readily understandable by ordinary persons, it is within the discretion of the

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[27] When evidence of the standard of care involves opinion testimony from a lay witness, DRE 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

[28] *Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1368 (Del. 1977).

trial judge to admit or exclude such evidence.[29]

If the subject matter of the litigation involves a trade or profession, expert testimony is usually required from those who are familiar with the degree and level of skill required in that trade or profession. The exception to that rule is found where the professional error is so apparent that a lay person exercising his or her common sense, is perfectly competent to determine whether there was negligence.[30] Where the action is based upon a statutorily imposed obligation, i.e., negligent *per se*, expert testimony is not normally required. However, expert testimony may also be required where it is necessary for a plaintiff to prove that the standard of care is greater than that mandated by a particular

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[29] In this regard, DRE 702 states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[30] *Norfleet v. Mid-Atlantic Realty Co., Inc.*, 2001 WL 695547 at *5 (Del. Super. Ct. Apr. 20, 2001).

statute.[31]

B. Impact of the Sriro Declarations

Critical to the Plaintiffs' argument that the standard of care applicable to the design, operation and/or maintenance of commercially managed swimming pools in Indonesia is contained in Regulation 061, are the September 26 and October 10, 2006 declarations of Mr. Sriro. A review of those affirmations in light of that authority is therefore appropriate.

In his first declaration, Mr. Sriro attached what he deemed to be a certified and therefore authoritative translation of the original Indonesian version into English. In his words, the result was "reasonably accurate".[32] He went on to state that he had reviewed "the relevant Indonesian law applicable to the design and maintenance of public swimming pools" including

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[31] *Vandiest v. Santiago*, 2004 WL 3030014 at *6 (Del. Super. Ct. Dec. 9, 2004).

[32] Notice of Lodging of the Declaration of Andrew Sriro, Esquire, *Lee v. Choice Hotels International, Inc.*, Docket 145 at para. 5 (Del. Super. Ct. Sep. 28, 2006).

Regulation 061. Based upon that review, Mr. Sriro identified three measures that Regulation 061 required operators of public businesses to take in the design and operation of resort swimming pools in Indonesia. To be specific, he identified those areas as (1) the employment of trained lifeguards, (2) maintain limitations upon the slope of the pool floor depending upon the depth of the pool and (3) maintain signage indicating the depth of the water and separation marks to protect those who cannot swim."[33]

In his second proffer, Mr. Sriro stated that in his "opinion, Regulation 061 unequivocally established the relevant standard of care".[34] Any violation thereof would as a result constitute negligent *per se*.[35] He also concluded that it applied to all of Indonesia and that there were no regional or local regulations otherwise governing the safe design and operation of public

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[33] *Id*. at para. 6.

[34] Notice of Lodging of the Second Declaration of Andrew Sriro, Esquire, *Lee v. Choice Hotels International, Inc.*, Docket 148 at para. 3 (Del. Super. Ct. Oct. 11, 2006).

[35] *Id*. at para. 13.

swimming pools.[36]

Mr. Sriro went on to opine that an additional obligation may arise under and by operation of Indonesian law and the parties to an agreement, citing Articles 1233, 1339 and 1365 of the Indonesian Civil Code.[37] He proffered that an implied warranty of safety arose and was imposed upon Choice. Any breach of that warranty, he stated, would give rise to a cause of action to recover the losses so occasioned.[38] He did not, however, provide translations of that authority nor did the Plaintiffs indicate that they intended to rely thereon pursuant to DRE 202.

Equally significant is what Mr. Sriro did not say. He did not refer to the existence of any guidelines from whatever source, local standards/practices or conditions in the area surrounding the Waterfront City resort.[39] Mr.

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[36] *Id*. at para. 14-17.

[37] *Id*. at para. 4-6.

[38] *Id*. at para. 7-8.

[39] His ignorance would have to include a lack of knowledge of the ANSI/NSPI guidelines which Mr. Ebro attempted to trumpet as the standard in Indonesia notwithstanding lacking any knowledge as to whether they had been translated into the Indonesian language or

Sriro also failed to include any Indonesian decisional law relative to swimming pool design, operation or maintenance whether grounded in negligence or upon a theory of implied warranty.

Based upon the record as it presently exists and in light of the dictates of DRE 202(e), it appears that Regulation 061 is valid law applicable to the entire Republic of Indonesia. It applies to public swimming pools that are commercially managed. The regulation does not offer any further definition or interpretation of the term, or whether there are any exceptions/exclusions that may be pertinent to the Waterfront City resort pool in question.

The Court does not take judicial notice or otherwise accept as valid the balance of Mr. Sriro's averments in either declaration. As to the suggested implied warranty of safety or fitness, no other result is possible given the lack of supporting information relative to the Indonesian law upon which he is relying, as well as Mr.

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shared with as well as adopted by any resorts in that part of the world.

Sriro's professional qualifications and/or experience to provide such an opinion. A similar conclusion applies to his findings concerning the absence of any other regulations, laws or authority relative to swimming pool design, operation and maintenance, or what constitutes negligence *per se*.

In any event, a more detailed review of Regulation 061 must be conducted to determine the extent it plays a part in the determination of the standard of care applicable to resort swimming pools.

C. Regulation 061

The Plaintiffs' evidence as to the applicable standard of care is based principally upon Regulation 061 and the attachment thereto.[40] Accordingly, the critical

[40] As noted above, *supra* note 16, the Plaintiffs have complained that the declarations filed by or on behalf of Bo Hyun Lee, Young Min Lee and Mr. Ebro should have been considered by the Court in addressing the instant motion. However, those affirmations filed after Mr. Ebro was stricken as an expert witness, reference conduct that is alleged by the Plaintiffs to violate whatever standard of care may exist. They do not provide any evidence as to the conduct allowed or prohibited relative to swimming pool design, operation and maintenance. As a result, that testimony is simply not helpful even if considered at this juncture in the litigation.

provisions of Regulation 061 critical to the issues involved in addressing the pending motion are not in dispute. They are as follows:

HEALTH REQUIREMENTS FOR SWIMMING POOLS AND PUBLIC BATHS

CHAPTER III

MANAGEMENT AND PERSONNEL

. . .

Article 6

(1) Every swimming pool and public bath must employ lifeguard personnel and first aid personnel having the certificate legalized by the local *Kadinkes*.

(2) The lifeguard personnel and first aid personnel must be healthy, with the evidence of certificate of health from the Government's doctor.

(3) The health examination of lifeguard personnel and first aid personnel shall be conducted regularly at least once a year.

. . .

CHAPTER IV

HEALTH WORTHINESS

Article 8

(1) Every swimming pool and public bath must have a certificate of health worthiness issued by the *Kadinkes.*

(2) The certificate of health worthiness as set forth in paragraph (1) shall be used as the requirement for the application for swimming pool and public bath business license.

(3) The procedure for obtaining the certificate of health worthiness as set forth in paragraph (1) shall be stipulated by the Director General.

. . .

CHAPTER VI

SANCTION

Article 11

(1) The violation of any provision of this regulation that may endanger public health shall be subject to criminal sanction under Law No. 11 Year 1962 on Hygiene for Public Businesses.

(2) The violation of the provision of article 8 of this Regulation shall be subject to administrative sanction, namely oral, written warning until the revocation of business licence. . . .

ATTACHMENT

. . .

5. Building and sanitation facilities requirements

a. Area for swimming pool and public bath pool

- There must be a clear separator between the swimming pool area and other areas so that any unauthorized person would not be able to enter.

- The swimming pool must be always fully filled with water.

. . .

- At a depth of less than 1.5 meter, the slope of the poll floor shall not exceed 10%, at a depth of more than 1.5 meters, the slope of the pool floor shall not exceed 30%.

. . .

- There must be clear signs to indicate the depth of the swimming pool and a separator for those who are able to swim and not able to swim.

. . .

6) Other facilities:

. . .

b. There must be rescue equipment for swimmers, eg life buoy, life belt, etc. [sic]. . . .

The foregoing language constitutes that referenced by the parties as relevant to the issues now being litigated or by the Court through independent research. There are at least three areas, however, which the regulation does not address.

First, the regulation does not define to what it applies other than "swimming pools and public baths which constitute as part [sic] of public businesses."[41] It goes on to describe a "swimming pool" only as the "means that provides the facility for swimming, recreation, sport and other services, using processed clean water and is managed commercially."[42] Whether there are any exceptions based upon size, function, nature of ownership or

[41] Notice of Lodging of the Declaration of Andrew Sriro, Esquire, *Lee v. Choice Hotels International, Inc.*, Docket 145 exh. B at 1 para. b (Del. Super. Ct. Sep. 28, 2006).

[42] *Id.* at 3 para. 2.

location is not evident based upon an examination of Regulation 061 in its entirety.

Second, there is no definition as to the number of lifeguards, where they were to be located or the hours of their service. There is no requirement that there be warnings or notice as to the absence, presence or location of any lifeguards hired. Nor is there any definition of "Kadinkes", what constitutes a "certificate legalized" by the former or when it is to take place.[43] Similarly absent is any explanation of what is meant by "health worthiness".[44]

Third, even where the regulation references pool design, operation and/or maintenance, it lacks any degree of specificity. For example, there is no interpretation of what constitutes a "separator" versus a "clear separator" as well as how or where they are to be placed.[45] To the extent the regulation addresses the slope of the pool floor, it is silent as to how and from

[43] *Id*. at 6 para. 1.

[44] *Id*. at 7 para. 1.

[45] *Id*. at 15 para. 5a.

where it is to be measured.[46] In addition, while it mandates the availability of rescue equipment, the regulation fails to specify what equipment is required other than by example, where whatever equipment that is selected is to be placed along with who is to operate the same.[47] There do not appear to be any other references that might even arguably be related to the design deficiencies about which the Plaintiffs complain.

Lastly, Regulation 061 makes nonspecific reference to other authority which is apparently to be viewed and/or used in conjunction with the obligations imposed directly by the language of the regulation. As noted above, Article 13 of the regulation unequivocally states that "[a]ny technical matters that have not been provided for in this regulation shall be stipulated by the Director General". Similarly, Section 6(b) of the Attachment to Regulation 061 mandates, without more, that "[t]here shall be swimming pool rules and hygiene recommendation[s]". There is no further discussion in

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[46] *Id.*

[47] *Id.* at 20 para. 6b.

the regulation or the attachment as to what these references mean, where the authority so referenced can be located or even to what they are directed.

Expert Testimony is Required to Establish the Standard of Care

The Court must conclude, after having reviewed the record as well as the applicable law, that in order to establish the standard of care relevant to the tortious conduct alleged to have take place on May 6, 2001 based specifically upon Regulation 061 as well as generally, the Plaintiffs must bring forth evidence from one with specialized knowledge, training, education and/or experience. That conclusion is based upon the fact that the subject matter requires the interpretation and application of numerous provisions of foreign law in a jurisdiction where English is not the primary language. It also concerns determining the standard of care relevant to swimming pool design, operation and maintenance in a foreign commercial setting, knowledge of which is clearly outside the ken of the average juror in

Delaware. Lastly, the standard the Plaintiffs argue existed on the date Chan Young Lee nearly drowned in Indonesia appears to differ significantly from that which exists in this country and expert testimony is necessary to explain and distinguish one from the other.

The Plaintiffs agreed, at least initially, and proffered first the testimony of Mr. Ebro, followed by the views of Mr. Johni on the same subject. Unfortunately from the Plaintiffs' perspective, Mr. Ebro's testimony in this regard was precluded and Mr. Johni was not allowed as a substitute. That leaves only Mr. Sriro to establish that Regulation 061 as the basis for the relevant standard of care in this case.

To the extent that the Plaintiffs now view the situation differently following the exclusion of testimony by Mr. Ebro and Mr. Johni, they are incorrect. Operation of swimming pools in a commercial setting, even by an international hotel/resort chain, involves a peculiar profession or business which the Plaintiffs have previously suggested is subject to special oversight via

ANSI/NSPI.[48] The testimony and evidence in this regard must therefore be from one familiar with the standard of care in that business or profession.

By way of illustration, the Court need only look at Mr. Ebro's proposed testimony relative to the standard of care in the United States versus that in Indonesia. According to Mr. Ebro, the standard in this country is higher, a conclusion that he based upon his survey of resort swimming pools in Indonesia similar to Waterfront City.[49] Ignorance as to those standards, along with the possibility of juror confusion without the assistance of expert testimony, looms large. There is also the need for expert testimony as to the meaning and application of the provisions of Regulation 061 as well as any omissions therefrom.

As noted, the record is devoid at present of any expert testimony regarding the standard of care or causal link between the acts and omissions about which the Plaintiffs complain and the injuries suffered by Chan

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[48] *Lee*, 2006 WL 1148752 at *2-3.

[49] *Id.* at *6 n.17.

Young Lee. Without more, the Plaintiffs' causes of action, each of which rely upon the alleged failure by Choice to act or refrain from acting in a certain fashion in accordance with whatever standard of care is legally mandated in Indonesia, must fail. The only exception could be a claim based upon negligence *per se*. However, that cause of action requires proof that Regulation 061 constitutes the standard of care in this situation. That in turn depends upon the content of that statute as established via DRE 202, which will be addressed *infra*.

Regulation 061 does not Represent the Applicable Standard of Care

The regulation and attachment as translated do not describe or prohibit the conduct about which the Plaintiffs complain or otherwise describe the duty of care to be met. The specific prohibitions upon which the Plaintiffs rely as deficiencies in the manner which Choice designed, operated and/or managed the Waterfront City resort swimming pool have not been established via Regulation 061. There are general statements but without

direction concerning the specific conduct required or prohibited. There is no discussion, definition or clarification as to the omissions referenced above. To the extent that there are references to other authority, they are vague and unclear as to what they concern or relate.

Moreover, there is no testimony, expert or otherwise, as to how Regulation 061 is to be applied, where or by whom. No expert or lay testimony addresses how coverage is to be ascertained and whether Choice is included or excluded. And, according to Mr. Sriro, Regulation 061 is all there is in terms of swimming pool design, operation or maintenance. He draws that conclusion notwithstanding the references in the regulation to stipulations by the Director General as well as to some unspecified and as of yet unknown swimming pool rules.

In the absence of any substantive definition of the conduct to be proscribed and/or mandated, Regulation 061 can not be used to establish the standard of care applicable to commercially managed swimming pools in Indonesia. This conclusion applies to any allegations of

negligence generally or negligence *per se*.

To the extent that the Plaintiffs attempt to label Mr. Sriro as an expert witness as to the standard of care or in any other area relevant to this litigation, they cannot do so.

First, Mr. Sriro was not offered as an expert in swimming pool design, operation and maintenance. According to the Plaintiffs, Mr. Sriro was not "an ordinary expert, but an authority on foreign law."[50] In addition, Sriro's declarations reference the viability of Regulation 061 as evidence of Indonesian law and the existence of a cause of action for an implied warranty of safety, not what is required of commercially managed resort swimming pools.

Second, even if Mr. Sriro was offered as such an expert, he has no demonstrated experience, education or training in those areas, focusing instead on commercial and corporate legal matters. While his research regarding

[50] Pl.'s Surreply to New Arguments Raised in Defendant's Response to Pl.'s Opposition to Supplement to Defendant Choice Hotels International, Inc.'s Motion for Summary Judgment, *Lee v. Choice Hotels International, Inc.*, Docket 193 at 2 (Del. Super. Ct. Mar. 20, 2008).

the geographical applicability, temporal viability and substantive scope of Regulation 061 may have been helpful for purposes of establishing foreign law via DRE 202(e), that assistance stops there. His declarations demonstrate that, similar to Mr. Ebro, he enjoys no apparent distinction apart from a level of pre-litigation ignorance concerning the aforementioned standard of care in this area of the world.

Third, the declarations, even when viewed in the most favorable light, are lacking in substance or are contradictory concerning the existence of a standard of care. Mr. Sriro, unlike Mr. Ebro, conducted no research on and made no contact with any of the resorts in Indonesia similar to Waterfront City to determine the standard of care and/or how it was to be applied. He opines that Regulation 061 constitutes the applicable standard of care in this case. Notwithstanding that claim, the Court notes that none of the governmental sources Mr. Sriro referenced in his second declaration concluded that Regulation 061 applied to Waterfront City or had any impact on the standard of care governing such

resorts in Indonesia. In addition, Mr. Sriro does not reference any judicial or administrative decisions in support of his conclusions.[51]

There is no Violation of Any Standard of Care Set Forth in Regulation 061

Assuming *arguendo* that Regulation 061 references the standard of care relevant to Choice's design, operation and maintenance of the Waterfront City resort, the Court, based upon the record, must conclude that the conduct about which the Plaintiffs complain did not violate the aforementioned standard.

At the risk of being repetitive, Regulation 061 does not require anything more than that lifeguards be hired. The regulation does not require that signs relative to the their presence or absence be maintained or where. The same holds true for depth markings, separators and safety equipment. Further, the regulation does not specify when

[51] It is also noteworthy that in his first declaration, Mr. Sriro averred that he had reviewed the laws of Indonesia relevant to the design and maintenance of public swimming pools. Nevertheless in his second declaration he indicated that Regulation 061 was all that there was on the subject.

and where the depth be marked, and there is no evidence that what did exist violated Regulation 061.

Implied Warranty of Safety or Fitness

Simply put, even if the Court were to assume for present purposes that such a cause of action may exist in Indonesia, the same deficiencies that are recounted above are controlling for purposes of this claim.

First, it is readily apparent that expert testimony is needed to establish the respective obligations of the parties under Indonesian law as noted previously. The subject matter is beyond the ken of the average juror, and the only evidence in the record in this regard is from Mr. Sriro whose declarations reveal no expertise in the area of swimming pool design, operation or maintenance.

Second, even if one were to assume that no expert testimony is required, the record is devoid of any evidence as to the scope of the warranty or its application in terms of time or geography on the date of the near fatal injury to Chan Young Lee. Viewed in their most favorable light, Mr. Sriro's opinions in this regard

are unsupported by anything other than his own conclusions and have not been verified.[52] Unlike his testimony relative to Regulation 061, Mr. Sriro's declaration as to the existence of an implied warranty are not supported by translations of the Indonesia Civil Code cited. He also fails to reference any decisional law or indicate whether the aforementioned provisions of law are the extent of the law in Indonesia on the subject as he did in his second declaration regarding Regulation 061.

Given the state of the record in this regard, no matter how favorably the evidence is viewed, the Plaintiffs are not able to maintain a cause of action based upon an implied warranty of safety or fitness. The Court does not accept Mr. Sriro's testimony as to the existence of such a cause of action given the deficiencies in his proffer as to its existence. There is no proof of the scope or application of the warranty in any event. Lastly there is no indication as to how the warranty was violated according to Indonesian law.

[52] Moreover, Mr. Sriro does not comment on or reference the franchise agreements between Choice and the owners of the Waterfront City resort incorporating the ANSI/NPSI guidelines.

CONCLUSION

Based upon the foregoing, it appears, and the Court so finds, that there are no material disputes of fact and the Defendant, Choice Hotels International, Inc., is entitled to the entry of judgment in its favor as a matter of law as to the causes of action initiated against it by the Plaintiffs.[53] Accordingly, Choice's motion for summary judgment is **granted.**

To be more specific, the Plaintiffs have failed to establish the existence of the standard of care applicable to the design, operation and/or maintenance of resort swimming pools in Indonesia. They cannot therefore maintain an action based upon negligence in general or negligence *per se*. In the alternative, there is no evidence that Choice violated any standard of care that might have been applicable on May 6, 2001.

The Plaintiffs have also failed to establish the

[53] It is not necessary, as a result, to address the balance of the arguments raised by the Defendant or the Plaintiffs in response thereto.

existence or definition of a cause of action based upon an implied warranty of safety or fitness relative to the design, operation and/or maintenance of resort swimming pools in Indonesia on May 6, 2001. They can not, as a result, maintain such an action.

IT IS SO ORDERED.

TOLIVER, JUDGE