Third District Court of Appeal

State of Florida

Opinion filed December 18, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1514
Lower Tribunal No. 14-27829

Iman Kamal-Hashmat, etc.,
Appellant,

vs.

Loews Miami Beach Hotel Operating Co., Inc., etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jacqueline Hogan Scola and Antonio Arzola, Judges.

Podhurst & Orseck and Joel D. Eaton and Ricardo M. Martinez-Cid, for appellant.

Law Offices of Charles M-P George and Charles M-P George; Boyd, Richards, Parker, Colonnelli and Maria E. Dalmanieras, for appellee.

Before EMAS, C.J., and SALTER and GORDO, JJ.

SALTER, J.

Iman Kamal-Hashmat is the personal representative of the Estate of her late husband, Kamal Hashmat, who drowned in a hotel swimming pool in December 2013.[1] Mr. Hashmat's tragic death and the subsequent wrongful death lawsuit in the Miami-Dade Circuit Court (a) present a question whether or not a private hotel in Florida has a legal duty to hire professional lifeguards to supervise its swimming pool, and (b) the appropriate jury instructions to be given, based on the answer to that question.

The Parties, Lawsuit, Trial, and Defense Judgment

The appellant, plaintiff below, will be referred to as "the Estate." The appellee, defendant below,[2] Loews Miami Beach Hotel Operating Co., Inc., will be referred to as "Loews."

The Estate's wrongful death lawsuit against Loews alleged: Mr. Hashmat was a "paying guest" of Loews; Mr. Hashmat entered and swam in the hotel swimming pool, which was operated, maintained, and controlled by Loews; Mr. Hashmat struggled in the water and then became completely submerged; and "[a]s a result of the negligence and otherwise wrongful conduct of [Loews] . . . and/or the negligence vicariously attributed to [Loews], [Mr. Hashmat] died." Additional allegations

[1] Subsequent resuscitation efforts and intensive care treatment at Florida and New York hospitals proved unavailing, and Mr. Hashmat died in early 2014.

[2] The initial complaint named seven defendants; all but Loews were dropped before trial.

described Loews duties to Mr. Hashmat and other guests: "to provide, operate, control, manage, and/or maintain reasonably safe swimming pool(s), pool facilities, and/or pool environment . . . and to protect the guests and invitees, including [Mr. Hashmat] from unreasonable risk of physical harm."

The Estate's complaint also alleged that Loews "had an additional duty to promulgate proper policies and procedures" for the operation and maintenance of the swimming pool and pool area, including policies and procedures to train and supervise Loews [hotel employees and staff members], another additional duty "to exercise due care in hiring, training, and/or supervising" those hotel employees and staff members, and another additional duty "to warn users of the swimming pool(s)" and pool area "that there would not be a lifeguard on duty and warn about all other dangers associated with the use of [the pool and pool area]."

After pretrial motions, discovery, and other proceedings, the case was tried in 2018 before a jury. Two pretrial rulings affected the Estate's contention that Loews' obligation to have a professional lifeguard on duty, or not, was a fact issue triable to the jury. First, the trial court granted Loews a partial summary judgment on its motion for a ruling that Loews had no legal obligation to its guests to have professional lifeguards on duty when the pool was open: "While [the Estate] may have multiple grounds as to why Loews may have breached its duty to exercise

ordinary and reasonable care, it cannot rely on the lack of a professional lifeguard, alone, as the basis for the breach."

Second, the trial court granted in part Loews' motion in limine:

> [The Estate] is precluded from arguing or presenting testimony that Loews had a duty to provide a lifeguard or that Loews breached a duty or acted unreasonably solely by failing to post a lifeguard. However, reference to the use of the word lifeguard is not precluded at trial. [The Estate] may argue and present testimony that Loews owed a duty of reasonable care to its guests in providing for the supervision and safety of its pool, and that because there was no duty to have a lifeguard and Loews chose not to have a lifeguard, Loews should have taken any number of other safety precautions.

Among the jury instructions were these, as pertinent to the alleged trial court errors raised by the Estate in this appeal:

[As to negligence]

> Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances, or failing to do something that a reasonably careful person would do under like circumstances.

[As to legal duty and lifeguards]

> Loews -- meaning Loews Hotel -- owed a duty to exercise ordinary and reasonable care in its effort to provide for the supervision and safety of its pool. Loews did not have a legal duty to post a professional lifeguard at its pool. Whether or not Loews breached its duty to exercise reasonable and ordinary care is to be determined on the totality of the circumstances.

The stipulated form of special interrogatory jury verdict included three questions regarding liability:

> 1. Was Loews Hotel negligent in failing to maintain the pool in a reasonably safe condition, or negligent in failing to correct a dangerous condition in the pool about which it either knew or should have known, by the use of reasonable care, that was a legal cause of the injury and death of Kamal Hashmat?
> 2. Was Loews Hotel negligent in failing to properly monitor, supervise, and/or train its employees to properly monitor and supervise the safety of Hotel guests using the pool that was a legal cause of the injury and death of Kamal Hashmat?
>
> 3. Did Loews Hotel fail to exercise reasonable care after it undertook to perform CPR on Kamal Hashmat that increased the risk of harm or resulted in actual harm to Kamal Hashmat?

The jury answered each of the three questions by checking the line marked "NO," followed the directions on the verdict form to skip the damages interrogatories, and returned that verdict. A form of final judgment for Loews was duly entered by the trial court, and this appeal followed.

Analysis

The sole issue raised and argued by the Estate is whether the trial court erred in instructing the jury that, as a matter of law, the hotel had no legal duty "to post a professional lifeguard at its pool." "Florida law is clear that decisions regarding jury instructions rest within the sound discretion of the trial court and should not be overturned on appeal absent a showing of prejudicial error." Gonzalez v. Rose, 752 So. 2d 39, 41 (Fla. 3d DCA 2000).

The existence of a legal duty is a question of law for determination by the court, and we review de novo the trial court's rulings on that issue. McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992).

The trial court correctly concluded that Florida law does not impose a legal duty on the owner or operator of a private hotel swimming pool to provide a lifeguard for the protection of its guests. A rule within the Florida Administrative Code, Rule 64E-9.008, "Supervision and Safety," addresses "public swimming pools," and requirements for the training and certification of lifeguards at such pools (as well as requirements for safety equipment, pool rules, maintenance and access, and other aspects of pool operation). The authority for that rule originates in the public health provisions of section 381.006(13) and chapter 514, Florida Statutes (2019).[3] Although these statutes and the administrative rule impose legal requirements for professional lifeguards if hired to supervise a private hotel swimming pool, they do not specify that a private hotel must hire such a lifeguard to supervise swimmers in the hotel pool.

Nor do the cases cited by the Estate impose such a duty. The Florida Supreme Court decision in Pickett v. City of Jacksonville, 20 So. 2d 484 (Fla. 1945), is distinguishable. A trial court's final judgment on a demurrer (a pretrial ruling of no

[3] The applicable statutes and rule were in place at the time of Mr. Hashmat's accidental drowning. Chapter 514 contains detailed requirements for "Public Swimming and Bathing Facilities."

liability as a matter of law under prior civil procedural rules) was reversed in Pickett, because a municipal swimming pool which collected admission from bathers had allegedly provided two "attendants" who did not use available "watch towers" to observe some 250 persons then using the pool.

Some 43 years after Pickett, the Florida Supreme Court declined to review a decision of this court affirming a circuit court ruling "that a hotel has no duty even to post a lifeguard at its own swimming pool." Adika v. Beekman Towers, Inc., 633 So. 2d 1170, 1170 (Fla. 3d DCA 1994), rev. denied, 640 So. 2d 1106 (Fla. 1994), citing Frost v. Newport Motel, Inc., 516 So. 2d 16 (Fla. 3d DCA 1987), rev. denied, 525 So. 2d 878 (Fla. 1988). In approving the trial court's analysis in the Frost case, this court acknowledged the law's "distinction between areas of *limited* access (stores, hotels, shops) and *general* access (public pools, race tracks, amusement centers)." 516 So. 2d at 16, 17 (italics in the original).

Nor is the Estate's reliance on the "zone of risk" analysis in McCain persuasive. McCain involved an electrical utility's misidentification of the location of an underground electrical cable, and the resulting injury to the plaintiff when his excavating machine struck the cable. The Court observed, "[w]hile it is true that power companies are not insurers, they nevertheless must shoulder a greater-than-usual duty of care in proportion to the greater-than-usual zone of risk associated with the business enterprise they have undertaken." McCain, 593 So. 2d at 504.

Although Florida's courts have expressly recognized electricity's "unquestioned power to kill or maim" and the resultant "heavy" duty imposed upon power companies, id., no Florida court has determined that a privately operated hotel swimming pool creates a comparably foreseeable zone of risk. The risks and dangers inherent in swimming in a pool at which no lifeguard is in attendance are open, obvious, and known,[4] in contrast to the hidden high-voltage electrical cable in the McCain case.

Based on this analysis and a thorough review of the record, we find no abuse of discretion or legal error by the trial court pertaining to the jury instruction or alleged legal duty to post a lifeguard at the Loews pool. The final judgment is affirmed.

[4] Although the operative complaint alleged that Loews had a duty to warn users of the pool "that there would not be a lifeguard on duty," it does not appear that the Estate sought a jury instruction or special interrogatory jury verdict on the Estate's "duty to warn that there would not be a lifeguard on duty" theory of liability. The record was uncontroverted that a warning sign to that effect was posted and visible to guests at the time of the accident.