STATE OF MICHIGAN

COURT OF APPEALS

CARRIE L. NUYEN, as Personal Representative of the Estate of SAMMI JO HUNSBERGER, Deceased,

Plaintiff-Appellant,

v

MAXINE LOUDEN,

Defendant-Appellee.

UNPUBLISHED
October 9, 1998

No. 204009
Barry Circuit Court
LC No. 96-000249 NO

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition for defendant pursuant to MCR 2.116(C)(10) and ruling on several pretrial motions filed by both parties. We affirm.

Plaintiff's four-year-old decedent wandered away from her home and was found in the deep end of defendant's swimming pool several hours later. Attempts to revive her were unsuccessful. On appeal, plaintiff argues that the trial court's grant of summary disposition for defendant pursuant to MCR 2.116(C)(10) was improper because plaintiff had shown that the swimming pool was an attractive nuisance.

MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any matter of law." This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ. *Hottmann v Hottmann*, 226 Mich App 171, 175; 572 NW2d 259 (1997). This Court reviews the grant of summary disposition de novo. *Id.*

To prevail on her negligence claim, plaintiff must prove defendant owed a legal duty to the decedent. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). Generally, a landowner owes no duty to a trespasser, a person who enters upon his land without his consent, except to refrain from injuring him by "willful and wanton" misconduct. *Wymer v Holmes*, 429 Mich 66, 71, n 1; 412 NW2d 213 (1987). However, the doctrine of attractive nuisance "places an affirmative duty on landowners to carry on activities involving a risk of death or serious bodily harm with

reasonable care for the safety of known trespassing children." *Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 63; 498 NW2d 5 (1993)

Plaintiff argues defendant's swimming pool was an attractive nuisance. However, it is well-established that swimming pools and ponds maintained for legitimate purposes do not constitute attractive nuisances. *Graves v Dachille*, 328 Mich 69, 74-75; 43 NW2d 64 (1950); see also *Heino v Grand Rapids*, 202 Mich 363, 370; 168 NW 512 (1918). Accordingly, the trial court properly granted summary disposition to defendant.

In support of her argument that the doctrine of attractive nuisance applies to swimming pools, plaintiff cites *Taylor v Mathews*, 40 Mich App 74; 198 NW2d 843 (1972), and *Wymer v Holmes*, 144 Mich App 192; 375 NW2d 384 (1984), aff'd 429 Mich 66, 71; 412 NW2d 213 (1987). We find these cases inapposite. While *Taylor* did discuss the attractive nuisance doctrine, as set forth in 2 Restatement Torts, 2d, § 339, p 197, the issue in *Taylor* was whether the plaintiffs presented sufficient evidence that the defendants were guilty of gross negligence or wilful and wanton misconduct in order to avoid their claim being barred by MCL 300.201; MSA 13.1485. Moreover, while this Court stated that the plaintiff's claim in *Wymer* was based on the theory of attractive nuisance as well as a negligence theory, this Court did not address the issue whether the pond in which the child drowned was in fact an attractive nuisance.

In light of our conclusion that the swimming pool cannot be considered an attractive nuisance, we need not decide whether the trial court abused its discretion in granting defendant's motion in limine to bar evidence of subsequent remedial measures, in denying plaintiff's motion to bifurcate or in allowing evidence regarding the decedent's parents' history of criminal conduct and incarceration. See *Hunt v Freeman*, 217 Mich App 92, 100; 550 NW2d 817 (1996). However, because these issues may reappear on remand, we briefly comment on them.

The trial court properly ruled that evidence that defendant subsequently purchased locks and chains for the pool gates was inadmissible pursuant to MRE 407. We disagree with plaintiff's contention that the evidence was relevant to prove feasibility of remedial measures. There was no abuse of discretion. *Lopez v General Motors Corp (On Remand)*, 224 Mich App 618, 634; 569 NW2d 861 (1997).

Next, we find the trial court did not abuse its discretion in denying plaintiff's motion to bifurcate the trial. *Hodgins v Times Herald Co*, 169 Mich App 245, 261; 425 NW2d 522 (1988). The trial court could have cautioned the jury that it must only consider any evidence of parental neglect when determining damages.

Finally, we find the trial court did not abuse its discretion in preliminarily denying plaintiff's motion to exclude evidence that she and decedent's father had some history of criminal conduct and incarceration. The trial court denied plaintiff's motion without prejudice, indicating that it would revisit the issue at trial once the nature of the evidence was known. We do not believe the trial court abused its discretion in utilizing this approach. *Lopez, supra* at 634.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Henry William Saad