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NO. COA06-899

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

MICHAEL BLOHM,  
Plaintiff,

v.

Wake County  
No. 04 CVS 11828

RICHARD CLARK, JENNIFER CLARK,  
SACERIO EMPIRE, INC.,  
Defendant Appellees.

Appeal by plaintiff from judgment entered 15 February 2006 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 21 February 2007.

*The Law Office of Charles M. Putterman, by Charles M. Putterman, for plaintiff appellant.*

*Carruthers & Roth, P.A., by Jack B. Bayliss, Jr., for defendant appellee.*

McCULLOUGH, Judge.

Plaintiff appeals from judgment entered by the trial court granting defendant Sacerio Empire's motion for a directed verdict in its favor at the close of plaintiff's evidence.

Plaintiff instituted the instant action to recover damages arising from plaintiff's injury sustained on 8 July 2003. At trial plaintiff presented evidence which tended to show that plaintiff, his two children, defendants Jennifer and Richard Clark, defendants' children, guest Ryan Bargoil, and a lifeguard were

present at the Oak Hall pool on 8 July 2003. The swimming pool was managed by defendant Sacerio Empire which employed the lifeguard on duty at the time, Jonathan Lunchick.

Plaintiff and defendant Jennifer Clark were in the shallow end of the pool with their young children and two of the older boys were playing with diving sticks in the shallow end of the pool as well. The rest of the pool was empty. Diving sticks are plastic sticks measuring around eight inches which are brightly colored sticks weighted at one end and intended to sink to the bottom of the pool in order to then be retrieved by the children. Plaintiff became uncomfortable with the boys throwing the diving sticks near the young children and at some point his comments regarding the children and their activity caused the lifeguard to blow his whistle. After blowing the whistle, the lifeguard instructed the two older boys to move into an unoccupied section of the pool to play with their diving sticks.

The older boys did as they were instructed by the lifeguard but eventually drifted back towards the shallow end of the pool causing the lifeguard to blow his whistle for a second time in order to instruct the boys to move back into the deeper end of the pool. Shortly after the second whistle was blown, plaintiff was hit in the face causing injury to his eye by a diving stick thrown by Ryan.

Excerpts from the deposition of the lifeguard were introduced during the plaintiff's presentation of evidence in which the lifeguard testified that diving sticks were permitted at the Oak

Hall pool; that there were certain objects which were not permitted; and that he did not see any problem with the conduct of the children throwing the diving sticks. The lifeguard further testified that he blew the whistle and instructed the boys to play in the deep end of the pool both times due to the comments of plaintiff and not due to the actions of the boys.

At the close of plaintiff's evidence, defendant Sacerio Empire, motioned the court to enter a directed verdict in its favor where plaintiff failed to present any evidence of negligence on the part of Sacerio Empire. The court granted the motion for a directed verdict in favor of defendant Sacerio Empire, and from the judgment entered thereafter plaintiff appeals.

The sole issue presented by this appeal questions whether the trial court erred in directing a verdict for defendant Sacerio Empire. We hold that the trial court did not commit error.

A defendant's motion for directed verdict made pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to support a verdict for the plaintiff and the question presented is whether the evidence is sufficient to go to the jury. *Whaley v. White Consol. Indus., Inc.*, 144 N.C. App. 88, 92, 548 S.E.2d 177, 180, *disc. review denied*, 354 N.C. 229, 555 S.E.2d 277 (2001). In ruling upon the motion, the evidence is viewed in the light most favorable to the nonmoving party, who is to be given the benefit of every reasonable inference which may be drawn from it. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977).

In *Manganello*, the court set forth the duty imposed upon the owner or proprietor of a swimming facility: "The owner is not 'an insurer of the safety of his patrons' but he must exercise 'ordinary and reasonable care' for their safety lest he be held liable for injury to a patron resulting from breach of his duty." *Id.* at 670-71, 231 S.E.2d at 680 (citation omitted). Further a proprietor is liable for the negligent or intentional acts of third parties ""for injuries resulting from the *horseplay* or *boisterousness* of others, regardless of whether such conduct is negligent or malicious, if he had sufficient notice to enable him to stop the activity. . . ." *Id.* at 671, 231 S.E.2d at 681.

The Court in *Manganello* stated:

While rough or boisterous play in water is not dangerous *per se*, hazardous consequences to other swimmers and bathers are clearly reasonably foreseeable when such activities are left unattended and unrestricted. If rough or boisterous play is to be permitted at all, it should be confined to a restricted area or, at a minimum, closely guarded. . . . "[T]he law does not require the owner to take steps for the safety of his invitees such as will unreasonably impair the attractiveness of his establishment for its customary patrons."

*Id.* at 672, 231 S.E.2d at 682 (citation omitted).

In the instant case there was no evidence presented by plaintiff that the lifeguard on duty was inattentive or distracted. The lifeguard testified that the use of diving sticks was not prohibited by the rules of the pool and further that he sent the boys to a different end of the pool based solely on plaintiff's request that the boys not be allowed to throw the diving sticks in

the occupied shallow end of the pool. Further, the lifeguard immediately blew the whistle when the boys drifted back into the shallow end and instructed them to move back out of the restricted area. The actions of the boys could not be classified as boisterous, hazardous or horseplay and even if it were such, the lifeguard restricted the activity to a certain area and closely watched the actions of the boys to ensure compliance.

This evidence is in direct contradiction with the evidence offered by the plaintiff in *Manganello* in which the Supreme Court opined that a motion for directed verdict was incorrectly granted. In *Manganello*, there was evidence that the lifeguards were inattentive, the swimming area was crowded, there were several young men in the water jumping and flipping backwards from the shoulders of other young men, the activity went on for at least 20 minutes, and an expert witness testified that it was not an acceptable aquatic practice to allow young men to get on one another's shoulders and do back flips into the water. There is no such evidence in the instant case; and while the legal standards set forth in *Manganello* are applicable, the analysis is not analogous or controlling based upon the factual distinctions.

The evidence, even viewed in the light most favorable to plaintiff, failed to establish any negligence on the part of defendant Sacerio Empire and therefore the court correctly granted the motion for directed verdict in its favor.

Accordingly, the order of the trial court is affirmed.

Affirmed.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).