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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

# Landowner and Daughter Not Liable for Death of Minor who Drowned While Swimming in Private Lake at Afterschool Party

**By Ryan J. Koss** **January 27, 2017**

The Michigan Court of Appeals in *Warden-Pittman v. Pancotto*, No. 327005, 2016 WL 7333327 (Mich. Ct. App. Dec. 15, 2016) analyzed a property owner and her daughter's liability for a death that occurred at an swimming party hosted by them on a lake adjacent to their home.

Nikki Pancotto threw a swimming party involving 15-20 classmates at her mother Connie Pancotto's home in the Kingswood Estates Subdivision on Royal Lake. Connie had 15 lifejackets at her house, and before the party, borrowed additional life jackets from her neighbors in anticipation of the number of friends that were expected.

Decedent Montrice Coleman was not personally invited to the party by Nikki, but rather was brought by her friend Megan Darr. Coleman, who was not a strong swimmer, was encouraged to wear a life jacket, but refused. Decedent attempted to swim to a floating dock in the center of the lake, and ultimately drowned.

The facts surrounding Connie and Nikki's role before the drowning were not clear. Several teens testified that few partygoers were wearing life jackets. While there were life jackets available, neither Nikki nor Connie handed life jackets to any swimmers or informed them that life jackets were required. Additionally, after the drowning, Connie claimed that she immediately called 911 after hearing Darr yelling for help. However, another partygoer testified that Connie waited 5-10 minutes before calling 911 after realizing someone was missing.

As a result of this incident, Decedent Coleman's Estate sued Connie and Nikki Pancotto for ordinary and gross negligence. The trial court granted summary disposition for Defendants. The Court of Appeals

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The Recreational Land Use Act provides a useful defense to property owners in Michigan, but is often forgotten in standard premises liability cases. After *Warden-Pittman v. Pancotto*, even if a property owner cannot establish ownership of the place where an injury occurs, possessory interest and control of the place of the injury will be sufficient for the landowner to receive the protections of RUA. Additionally, *Warden-Pittman* is a reminder that social hosts only owe a duty to warn guests (licensees) of hidden dangers the host knows or has reason to know of, only if the guest does not know or have reason to know of the dangers involved.

affirmed summary disposition for Defendants, and in doing so, issued an opinion analyzing Michigan law regarding duties owed by landowners for injuries resulting from recreational activities.

The Court ruled that the Recreational Land Use Act (RUA), MCL §324.7330(1), barred Plaintiff's negligence claims against landowner Connie. "The RUA exempts an owner of land from liability for injuries suffered by a person while that person is using the owner's land for specified purposes if that person has not paid the owner a valuable consideration for such use, unless the injuries were caused by the owner's gross negligence or willful and wanton misconduct." *Id.* at *2. RUA's protection only extends to the "owner, tenant, or lessee of the land." In this case, there was no dispute that Decedent was a social guest of Connie Pancotto, that he did not pay her to swim in the lake, nor that swimming was a recreational activity. The parties disputed the nature of Connie's "ownership" of the lake where the incident occurred. The Court ruled that the RUA was not precluded simply because Connie could not prove ownership of the specific part of the lake where Coleman drowned. In this case, only property owners directly adjacent to Royal Lake, including Connie Pancotto, were allowed access to the water. Therefore, it was sufficient to show that Connie had a possessory interest, and control over, Royal Lake, for RUA to apply and insulate her from Plaintiff's negligence claim.

The Court also ruled that there was no evidence that Connie was grossly negligent. She went out of her way to ensure there were extra life jackets. While she did not make sure each teen wore a life jacket, the negligence standard "does not require one to exhaust every conceivable precaution to be considered not negligent." *Id.* at *5 (quotation omitted). Additionally, even if it was assumed that Connie delayed in calling 911, such evidence would only be considered "unreasonable" and did not amount to conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Nikki, the host of the party, was also alleged to have been negligent. Plaintiff asserted that Nikki, by choosing to host a swimming party, owed a duty to exercise reasonable care to avoid harm to her guests. The Court ruled, however, that Plaintiff could not prove Nikki was negligent because "plaintiff ha[d] not identified an affirmative action undertaken by Nikki that might have caused [decedent's] death." Rather, Plaintiff's allegations were things Nikki failed to do: she failed to warn Coleman of a drop-off in the lake and failed to warn Coleman that Kingswood Association required that swimmers wear life jackets. The Court ruled that the failure to act, or nonfeasance, cannot form the basis of liability in the absence of a special relationship. Nikki did not have a special relationship with Coleman as she was merely a social host. Additionally, Coleman was aware of a drop-off in the lake before he went swimming. He chose to encounter the potentially dangerous condition in the lake, and Nikki owed no duty to protect Coleman or provide additional warning with respect to those dangers.

**We welcome your questions -**

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