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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Court of Appeals Reaffirms No Liability Without Duty Even If Tragic Loss Case

By Drew Broaddus

It is well established that the first thing a plaintiff must prove, in order to proceed with a negligence claim, is duty. As our Supreme Court noted in *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004), "[i]t is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." Duty requires the defendant to conform to a specific standard of conduct in order to protect others against unreasonable risks of harm.

Duty was the central, and ultimately dispositive, issue in *Wheeler v Central Michigan Inns, Inc.,* Court of Appeals Docket No. 296511, an opinion that was released for publication on April 14, 2011. *Wheeler* involved "the tragic drowning death of five year old Domonique Wheeler" in the pool of defendant's motel. The Court of Appeals held that plaintiff was unable to demonstrate a duty owed, and the trial court's decision to grant defendant's motion for summary disposition was therefore affirmed.

On the night of Domonique's death, his mother took him and five other children, including her infant son, to defendant's motel to celebrate Domonique's sixth birthday. The older children swam in the motel pool while Domonique's mother remained on the pool deck, watching her infant son. Despite doing her best to watch both her baby and the older children in the water, at some point Domonique's mother lost sight of Domonique. When her attention was brought back to the pool, she discovered Domonique lying on the bottom, near the five foot depth. Domonique's mother had not seen him move to the deeper area of the pool nor did she see him struggling or having a difficult time staying afloat. He was unconscious and efforts to resuscitate him were unsuccessful. It was later determined that Domonique had been underwater for between one and five minutes.

The pool was three feet deep at its shallowest point and sloped down to five feet in the middle. The hotel had no staff monitoring the pool area, but signs prominently stated there was no lifeguard present. Because none of the children were more than five feet tall and only two could actually swim, Domonique's mother instructed them to stay in the shallow areas of the pool and not go into the middle (where the pool was at its deepest). There were no ropes or floatation devices strung across the pool. The Ingham County Health Department conducted an inspection of defendant's swimming pool in response to Domonique's death, and found no relevant violations.

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It is not uncommon for a plaintiff to describe his or her claim as ordinary negligence – even when it seems to fall squarely within premises liability – to avoid the "open and obvious" defense.

When a plaintiff successfully does so, defendants must keep in mind that the threshold question remains: What duty was owed?

Plaintiffs will often try to mix and match doctrines, arguing ordinary negligence to avoid the "open and obvious" defense while relying on premises liability concepts to establish duty. *Wheeler* is an example of this. If defense counsel can keep the focus on duty, this tactic will often fail.

Domonique's mother, as the personal representative of Domonique's estate, sued the motel for, among other things, wrongful death. The motel moved for summary disposition, arguing that it had no duty to protect Domonique because the pool was an open and obvious danger. The trial court initially agreed, but reversed that holding on reconsideration. On reconsideration, the trial court determined that the wrongful death claim was based upon an ordinary negligence theory, not a premises liability theory. The "open and obvious" doctrine, therefore, did not apply. Defendant then filed another motion for summary disposition, arguing that it had no duty to supervise Domonique under the circumstances. The trial court agreed and again granted summary disposition in defendant's favor. Plaintiff appealed.

The appellate court began its analysis by noting that the trial court properly found the "open and obvious" defense to be inapplicable. "[L]andowners owe a duty to exercise care to protect children from dangerous conditions on their premises notwithstanding the presence of those children's parents." Although "landowners owe minor invitees the highest duty of care," this duty applies to premises liability claims only.

Plaintiff argued that *Woodman v Kera, LLC*, 280 Mich App 125, 154 (2008) recognized a landowner's duty to protect minor invitees under the circumstances of this case. However, the Court of Appeals determined that *Woodman* was a premises liability case. Plaintiff herself stated that her cause of action sounded in ordinary negligence, rather than premises liability. This was, presumably, to avoid the "open and obvious" defense. The Court of Appeals would not let plaintiff have it both ways: she could not cast her claim in ordinary negligence to avoid the "open and obvious" doctrine, then rely upon premises liability concepts to establish a duty. In ordinary negligence, "property owners generally owe no duty to supervise minor children of guests on their property." The motel may have had a duty if Domonique had been unaccompanied by a parent *and* it had voluntarily assumed a duty to supervise the child. However, this was simply not the case here.

Wheeler reflects the practical reality that, in many cases, no duty is owed when a claim is brought outside the rubric of premises liability. This is because the most important consideration in finding a duty is the relationship of the parties. Plaintiffs often need to rely upon their status as an invitee (i.e., a premises liability theory) to argue that *any* duty was owed. This is because the landowner-invitee relationship is often the only relationship between the parties but, this also makes the claim vulnerable to dismissal under the "open and obvious" defense.

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