

PROMPT 911 CALL FOR HEATH CLUB CARDIAC VICTIM
BROWN v. ATLAS-KONA KAI, INC.

Court of Appeals of California, Fourth Appellate District, Division One
March 18, 2009

[Note: Attached opinion of the court has been edited and citations omitted.]

Michael Ponczocha collapsed in the hallway of the health club operated by Atlas-Kona Kai, Inc. (Kona Kai), on the afternoon of March 27, 2006, and died of cardiac arrest one-hour and 20 minutes later. His widow, Lissa Brown, appeals from summary judgment entered in favor of Kona Kai in her action for wrongful death. Brown argues that the court erred in ruling that Kona Kai's duty was limited to promptly summoning emergency services. She also contends that there is a triable issue whether Kona Kai called 911 within a reasonable time. We reject Brown's contentions and affirm the judgment.

BACKGROUND

To address the question whether Kona Kai summoned emergency services promptly, the parties focus on the actions Kona Kai's staff took in the minutes following Ponczocha's collapse at approximately 5:25 p.m. In the trial court proceedings, they generally agreed on four points along that timeline. First, the front desk of the Kona Kai contacted 911 "[a]t or about 5:36 p.m." Second, health club member Alejandro Troncellito reported the incident to 911 after the front desk reported it. Third, when Troncellito reached the 911 operator, he could hear the siren from an approaching emergency vehicle. Fourth, the paramedics arrived at approximately 5:47 p.m. Kona Kai argued in its motion for summary judgment that these facts show it summoned help promptly as a matter of law.

Brown cited several additional facts in support of her argument that there was a delay of "at least" 11 minutes between Ponczocha's collapse and the call to 911 which raised a triable issue whether Kona Kai acted reasonably under the circumstances. Kona Kai disputed Brown's characterization of the length of the delay, arguing that the evidence indicated that there was "at most" an 11-minute delay before 911 "retrieved" Kona Kai's call. Although Brown did not dispute the fact that two staff members initiated cardiopulmonary resuscitation (CPR) within a reasonable time, she offered evidence suggesting that one of those staff members did not know how to perform CPR.

Brown also submitted the declaration of Anthony Abbott, Ed.D., a claimed expert on health and safety at fitness facilities. Dr. Abbott stated that Kona Kai "failed to meet its obligations to the public" by, among other things, not having an automated external defibrillator (AED) on site and not having an emergency response plan which included training staff on the use of the telephones. The trial court sustained Kona Kai's objections to most of Dr. Abbott's declaration. In a footnote attached to the end of her opposition to Kona Kai's summary judgment motion, Brown cited in support of her broad definition of duty the 2006 legislation requiring all health clubs to have AED's available along with staff trained in their use by July 1, 2007. (Health & Saf. Code, § 104113.)

In the order granting summary judgment in favor of Kona Kai, the trial court reiterated its earlier ruling denying Kona Kai's motion for judgment on the pleadings—that a business proprietor's duty is limited to "com[ing] to the aid of a sick or injured invitee by promptly summoning emergency services." The court acknowledged that what constitutes "a reasonable time" is generally a question of fact for the jury, but found as a matter of law that Kona Kai's employees "immediately came to the aid of Mr. Ponczocha and summoned medical assistance."

DUTY OF CARE

Brown maintains that the operator of a health club also has a duty to have emergency equipment such as AED's on hand, and to train its staff on how to respond to foreseeable emergencies such as cardiac arrest. We turn first to Brown's complaint to determine the gist of her claims.

Brown's complaint alleges claims for negligence, premises liability and failure to warn. Specifically, she alleges that Kona Kai negligently managed and operated the health club "so as to cause and permit to exist unsafe conditions on and at said premises. Among other things, [Kona Kai] failed to have appropriate safety equipment at the premises, including a portable defibrillator [*sic*], failed to instruct personnel in appropriate safety procedures and failed to have on staff persons reasonably knowledgeable about appropriate safety procedures. Moreover, [Kona Kai] [was] negligent in the selection, hiring, training and supervision of staff at said premises, which resulted in their being unable to adequately, reasonably and timely respond to an emergency involving Michael Ponczocha."

Brown also alleges that Proczochoa was injured "because of [Kona Kai's] failure to timely and reasonably render medical aid as well as [its] failure to timely and reasonably contact appropriate medical personnel to provide medical care" and that "[s]aid conduct, acts and omissions further caused and contributed to" Ponczocha's death. Based on these allegations, we consider the duty of care required of property owners in general and operators of health clubs in particular.

Although the general rule of nonliability is that "no one is required to save another from a danger which is not of his making", courts have recognized exceptions to this rule where there is some "special relationship between the parties, giving rise to a duty to act." A special relationship exists between a property owner or manager and invitees, including business patrons. In the context of premises liability, the special relationship gives rise to a duty to maintain the premises in a reasonably safe condition and may give rise to the obligation to take affirmative measures "either to prevent foreseeable harm from occurring to those using the premises, or to come to the aid of a patron or invitee in the face of ongoing or imminent harm or danger."

Other rules define the scope of duty where, as here, the defendant is also the operator of a sports facility. As long as the defendant owner or operator uses due care not to increase the risks inherent in the sport, the injured plaintiff is barred from any recovery under the doctrine of primary assumption of risk.

Brown attempts to avoid the bar of assumption of risk by arguing that Kona Kai's duty is defined by what it was required to do *in response* to the imminent harm or danger occasioned by Proczochoa's collapse in the hallway of the health club. The flaw in Brown's reasoning is that the actions she argues a health club is required to take must be in place before an emergency such as

cardiac arrest arises; otherwise, they are not effective. Thus, to the extent Brown alleges Kona Kai failed to make the health club a reasonably safe place to pursue his fitness training, her claim is barred by primary assumption of risk. Brown does not and cannot claim Kona Kai's failure to install AED's or have emergency plans in place increased the risk of harm Proczocho was exposed to while exercising at club.

We conclude that Kona Kai's duty as operator of the health club was simply to call for help...

We therefore decline to expand Kona Kai's duty beyond that of promptly summoning emergency services.

REASONABLENESS OF KONA KAI'S ACTIONS

Brown contends that there is a triable issue whether Kona Kai summoned emergency assistance promptly, that is, whether it acted reasonably under the circumstances. As the trial court acknowledged, reasonableness in the exercise of the duty of care is ordinarily decided by the trier of fact. In this case, however, we agree with Kona Kai that the evidence would permit a reasonable jury to find Kona Kai acted reasonably and promptly as a matter of law.

The record does not reveal the exact time Kona Kai's staff discovered Ponczocha collapsed in the hallway of the health club. It was sometime "close to," "around," 5:25. p.m. Troncellito reached 911 after the front desk reported the incident "at or about" 5:36 p.m. Troncellito heard the sirens coming from Pt. Loma at the same time the 911 operator answered. Meanwhile, Kona Kai's staff was administering CPR to Proczocho. On this record, we conclude as a matter of law that Brown failed to sustain her burden to demonstrate the existence of a triable issue regarding the reasonableness of Kona Kai's efforts to summon emergency services.

DISPOSITION

The judgment is affirmed. Defendant is entitled to costs on appeal