

RETENTION POND DROWNING CASE STUDIES

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In the case of *Cope v. Doe*, Ill., 464 N.E.2d 103 (1984), Judith Cope brought a wrongful death action against the owners of an apartment complex where she lived after her son, David Askew, drowned in a retention pond on the premises. The apartment complex, Shore Heights Village, was designed to attract families with young children. The complex included a children's playground, a dog-run area, a swimming pool, tennis courts, a chip and putt golf course, and a club house with pool tables.

The retention pond, constructed to collect and retain surface water from the complex, was approximately 25 yards long and 15 yards wide. The pond was located 100 yards west of the apartment buildings. The president of the land company which owned Shore Heights testified that "he had no objection to children fishing there [in the retention pond] but that the pond was not to be used as a swimming area." The president further testified that "no precautions were taken to prevent children from going near the pond other than the manager of the complex warning the parents to keep their children away from the retention pond."

Plaintiff Cope testified that the manager of the Shore Heights Village, in describing the facilities available at the complex, had referred to the retention pond as a where "the children could fish and that sometimes they ice skated there in the winter." In addition, Cope and several ex-residents testified that they frequently saw children playing on the pond in both summer and winter. The manager of Shore Heights denied ever mentioning that the retention pond was used for recreational purposes.

On the day of the accident, David, age seven, and two friends went to the retention pond to play. "The part of the pond closest to the apartment buildings was approximately one-third covered with ice. The portion of the pond furthest from the complex was open water which, admittedly, could be easily seen." Testimony by the two other boys was conflicting regarding David's exact location on the pond in to the open water. In any David and the two other boys fell through the ice while kicking pieces of wood on the frozen pond. The two other boys were able to climb out the water to safety; David was One of the boys ran to the apartments to get help. By the time assistance arrived, David had drowned. A jury returned a \$150,000 in favor of plaintiff Cope. This verdict, however, was reversed on peal. According to the appeals "the pond was an open and danger and therefore owed no duty to plaintiff's decedent [David] as a matter of law." subsequently appealed to Supreme Court of Illinois.

According to the Illinois supreme court, negligence liability would imposed "where an owner or in possession or control of knows or should know frequent the premises and if cause of the child's injury was dangerous condition on the premises." As described by the court, dangerous condition is one which is "likely to cause injury to children generally who, by reason of their age and immaturity, would not be expected to comprehend and avoid attendant risks." When both of these prerequisites are met (dangerous condition and frequent use by children), the court found "harm to children is sufficiently foreseeable for the law to impel an owner or occupier of land to remedy the condition."

On the other hand, the state supreme court found there is no duty for an owner to remedy a condition on the land which "presents obvious risks which children would be expected to appreciate and avoid." According to the state supreme court, "there are many dangers, such as those of fire and water, or falling from a height, which under ordinary conditions may reasonably be fully understood and appreciated by any child of any age to be allowed at large."

The rationale for this rule is that, since children are expected to avoid dangers which are obvious, there is no reasonably foreseeable risk of harm. The law then is that foreseeability of harm to the child is the test for assessing liability; but there can be no recovery for injuries caused by a danger found to be obvious.

Cope maintained that "defendants, as commercial landowners, owed a duty to take reasonable precautions for the safety of those patrons who were invited to use the water on their land for recreational purposes." According to Cope, the facts of this case were "analogous to those where liability was imposed on the operator of a public bathing facility for the drowning of a child." The state supreme court found this argument "unpersuasive."

[W]e find the public bathing facility cases cited by plaintiff [Cope] inapplicable to the instant case. Our courts and the legislature have traditionally regarded public swimming pools differently from other bodies of water .... [I]t is inevitable that injuries will occur at public bathing facilities, and the law imposes a duty to guard against the character of accidents which common knowledge and experience teach are liable to befall those engaging in the sport which defendant had invited the public to participate in.

Such is not the case with a retention pond. Unlike a swimming pool, a retention pond is not used exclusively for recreational purposes. Although there may be collateral uses for a retention pond, its primary function is to collect and retain surface water to prevent flooding. Moreover, decedent's death was not the result of an accident occurring at the swimming pool defendants maintained at its complex.

As described by the state supreme court, the undisputed evidence in this case indicated that "the pond was only partially covered with ice and that a large portion of it was open water." Further, this open water was "clearly visible" to the boys. Given these facts, the court found that Cope had "failed to establish that the retention pond was a dangerous condition" as required to impose negligence liability.

The pond was an ordinary body of water which, as any other, presented the risk of drowning. We cannot say that it presented perils that were not appreciated by plaintiff's decedent. Accordingly, we hold that the defendants owned no duty to plaintiff's decedent as a matter of law.

The state supreme court, therefore, affirmed the judgment of the appellate court which denied Cope any recovery in this case.

Three state supreme court justices dissented from the opinion of the majority. In the view of one of the dissenting justices the risk of drowning in a partially frozen body of water: is not an open and obvious hazard to which no duty of care attaches.

I do not agree that a seven-year old can appreciate the fact that water that is partially frozen actually creates a greater risk of drowning, the fact that a pond is partially frozen, the water is at a temperature where a person who falls in may suffer from exposure . . . It may be apparent that if you step off the edge of a ditch you will fall in the hole. I do not think it is as obvious that if you stand on the frozen edge of a pond you will drown. In any event, I believe these issues were factual determinations to be made by the jury...

#### ALGAE COVERED POND

In the case of *Guillot v. Fisherman's Paradise, Inc.*, La., 437 So.2d 840 (1983), the parents of Kelin Ray Guillot brought a wrongful death action against Fisherman's Paradise after their son drowned in a sewerage oxidation pond located at the Flying Bridge Marina owned by the defendant corporation. The facts surrounding the incident were as follows:

Mr. and Mrs. Guillot and their two children, Kelin Ray, age two and one-half, and Kevin, age eight, had gone to spend the Easter weekend with Mrs. Guillot's parents, Mr. and Mrs. Sellers, at the Sellers' camp of the Toledo Bend Reservoir. Only Kevin had been to the camp previously with his grandfather, Mr. Sellers. On Easter Sunday morning after breakfast, there was an Easter egg hunt for the children. Following the hunt, Mr. Guillot took the two boys for

a paddle boat ride in an inlet of Toledo Bend Lake which bordered the back of the Sellers' property. The family ate dinner at approximately 1:00 p.m., after which, at about 2:00 or 2:30, Mr. Guillot, Kevin and Kelin began riding a minibike Mr. Guillot had brought to the camp for Kevin. Mr. Guillot and Kevin took turns giving Kelin a ride on the minibike . . . The other adults . . . were cleaning the Sellers' yard around a playhouse which was near the driveway gate.

Mr. Guillot ceased riding the minibike and Kevin continued, alternating riding alone and riding with his brother. Mr. Guillot joined the other adults cleaning the property. Mrs. Sellers and Kevin testified that when Kevin would let Kelin off the minibike to ride alone he would put Kelin in the yard and Kelin would go toward the adults until Kevin returned. The driveway gate was left partially open because of the minibike riding...

Kevin testified that, prior to his last ride alone, he took Kelin for a ride on the minibike and upon returning to the Sellers' camp let Kelin off inside the open gate and watched him walk toward his grandmother in the direction of the playhouse. Mrs. Guillot testified that she saw Kelin playing in the sand by the gate eight to ten minutes before it was discovered he was missing.

When Kevin returned from his solo ride, Mrs. Sellers asked him where Kelin was. Kevin . . . told her he had let Kelin off inside the gate. A search then began for Kelin, at approximately 3:00 or 3:30 p.m. Forty to sixty minutes later the child's body was discovered floating face down in the sewerage oxidation pond. Mr. Guillot recovered the child's body from the pool and attempted to revive him . . . These efforts to save the child's life were of no avail. The child's death certificate listed the cause of death as "drowning;" no autopsy was performed.

The trial court found that Fisherman's Paradise was "negligent in failing to enclose the oxidation pond, since it was foreseeable that this kind of accident might occur." The trial judge stated: "knowing children and their nature, I think it was entirely foreseeable that children would be attracted... children love to climb hills and mounds and things of that kind, and there should have been a fence preventing young children from going into that pond."

The oxidation pond, located proximately one hundred feet from the gate of the Sellers' property was described as follows:

The sewerage oxidation pond was completely covered with light green algae approximately one inch thick, trapping trash such as

cans and cups. A two and a half to three foot embankment surrounded the pond, but there was no other border surrounding the sewerage oxidation pond. There was a partially completed fence around the pond, but it was only for aesthetic purposes.

Mr. Dozier [a co-defendant in this case] explained: "It was a wooden, crossed fence. Had it been intended to keep children out of the pond or had there been any requirement for that, they'd either have used hog wire or chicken wire, something smaller." The pond was the same depth from the banks to the middle. Mr. Guillot testified that it was waist deep. The sides of the pond did not slope, but formed a straight drop from the embankment sides into the water.

Neither the Gulllotts nor the Sellers knew of the existence of the sewerage oxidation pond. A fence approximately three feet in height surrounded the marina. However, a portion of this fence was down. The marina property facing the Sellers' property was not fenced. There was testimony by Kelin's parents and his grandfather that "Kelin had never wandered before and that he was an obedient child." Further, these adults had "warned Kelin about the lake, the only hazard they were aware of, and that he never went to the lake to feed the ducks unless accompanied by an adult."

The trial court, however, denied any recovery finding the parents were contributorily negligent "for allowing a two and one-half child to be ridden on a minibike, of their sight, by an eight and a half or nine year old brother, in an area unfamiliar to both parents." Further, the trial judge found that the parents "failed to provide adequate supervision for the child under the circumstances as they existed at that time."

Consequently, the trial court dismissed the Guillot's claim. An appeals court affirmed the dismissal. The Gulllotts subsequently appealed to the Supreme Court of Louisiana.

As stated by the supreme court: "Actionable negligence results from the creation or maintenance of an unreasonable risk of injury to others." In determining whether the risk is unreasonable, the court would consider "not only the seriousness, but also the likelihood of the harm that may be caused in relevant." In the opinion of the state supreme court, water poses a significant risk to small children.

[W]here small children may be expected to be exposed to the risk, liability for their consequent injury results from conduct or from the maintenance of premise conditions creating an unreasonable risk of injury to them. Young children are naturally attracted to

exposed pools and bodies of water. Exposed bodies of water with no enclosure or barricade present a great risk of drowning to children of tender years.

Applying these general principles to the facts of this case, the state supreme court affirmed the finding of the lower courts that the defendants were "guilty of negligence" under the circumstances.

The sewerage oxidation pond was undoubtedly attractive and alluring to children in view of its contents and location. It was covered with a light green grassy algae which contained debris. It was not fenced in or enclosed and was located on a recreation facility near trailers often rented to families on vacation.

The risk of drowning presented by the sewerage oxidation pond could have been easily eliminated by the installation of a fence or other enclosure sufficient to keep children out. Under the circumstances of this case, the installation of a fence or other enclosure was a precaution which a reasonable person would have taken.

The state supreme court, therefore, found the Fisherman's Paradise "liable to the decedent's parents for the wrongful drowning of their minor child." Having found defendant liable for negligence, the state supreme also rejected the trial court's that the parents were barred recovery by the defense of contributory negligence. "There was causal connection between the of the minibike and the and, thus, the parents cannot be contributorily negligent for Kelin to ride the minibike." The supreme court further whether parental supervision of child was substandard under these circumstances. As described b supreme court, it is not inadequate parental supervision constituting contributory negligence when a child wanders off.

Failure to take every precaution against every foreseeable risk or to use extra-ordinary skill, caution, and foresight does not constitute negligence or contributory negligence. A mother of small children is not required to chain them up or to act as their constant jailer in order to absolutely secure them from exposure to hazards negligently created or maintained by a tortfeasor. She is required only to use reasonable precautions, and her conduct in this regard is not negligent if, by any common-sense test, it is in accord with that of reasonably prudent persons faced with similar conditions and circumstances.

Applying these general principles to the facts of the case, the supreme court found "the precautions against harm to child were reasonable and did fall below the standard of required for such protection."

The Guillots and the Sellers had warned Kelin about the lake and had never permitted him to go alone to the lake to feed the ducks; an adult always accompanied him. This was the only water hazard the Guillots and the Sellers were aware of. The inattention of the parents which allowed a child who had never wandered before, to escape from his parents' eyesight and attention does not amount to contributory negligence . . . The action of leaving the gate partially open in an area where there was much activity and the presence of five other persons does not constitute contributory negligence.

Consequently, the state court concluded that Fisherman's Paradise had "not borne their burden of proving contributory negligence on the part of the parents." As a result, the state supreme court reversed the dismissal of Guillot's wrongful death claim by the lower courts and remanded the case to the appeals court to fix damages. The appeals court awarded the parents \$50,000. This appeals court decision awarding damages was reported in *Guillot v. Fisherman's Paradise, Inc.*, La. App., 451 So.3d 568 (1984).