

BROKEN HOT TUB TRANSMITS WATER BORNE DISEASE
GALLO v. PM HOSPITALITY STRATEGIES, INC.

SUPERIOR COURT OF DELAWARE, NEW CASTLE
March 28, 2008

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

This is a premises liability action filed by Sandra Gallo ("Plaintiff") against P.M. Hospitality Strategies, INC. ("Defendant"). After a three-day trial, a jury returned a \$150,000 verdict in favor of Plaintiff on Aug. 16, 2006.

FACTS

On the weekend of November 22-24, 2002, Plaintiff and her family stayed at an Embassy Suites Hotel ("Hotel") in Newark, DE. At the time, Plaintiff was living in New York and her husband was living in Delaware due to a recent change in his employment. On the weekend in question, Plaintiff and her children traveled to Delaware so the family could spend the weekend together.

The Hotel includes a pool and spa. A few days prior to Plaintiff's arrival, Hotel personnel drained the spa for routine cleaning and maintenance. After refilling the spa with regular tap water, workers attempted to turn it on, but one of the spa's two water pumps failed to operate. The malfunctioning pump is responsible for circulating water through the spa's filtration system, which also heats the water and adds chemicals such as chlorine. The pump is also used to drain the spa. Due to the malfunctioning pump, the spa contained untreated water when the Gallo family arrived at the Hotel.

Witnesses for the Defendant testified that signs printed on 8" x 11" sheets of paper were posted on the doors entering the pool area and by the spa's operating switch stating that the spa was out of order. Defendant could not produce these signs or locate the electronic file to reproduce the documents for trial.

Over the course of the weekend, Plaintiff and her children used the spa on at least two occasions. Plaintiff testified that she observed at least one other guest using the spa as well. According to Plaintiff and her husband, neither of them had any indication that the spa contained untreated water. Although they both noticed a small Post-it Note sized out-of-order sign over the spa's timer, they thought that the sign dealt only with the timer. They both testified that the water was warm, not hot, but they did not suspect anything out of the ordinary.

On Tuesday, November 26, 2002 (two days after using the spa) Plaintiff noticed a rash on her body. She went to her family doctor, Dr. Hanna Habash, that same day and was diagnosed with hot-tub folliculitis. As the name implies, the condition is caused by an infection of the hair follicles by a species of bacteria that is frequently present in hot tubs, spas and swimming pools. Dr. Habash prescribed two antibiotics to treat the infection.

Plaintiff finished the course of antibiotics, and the rash eventually disappeared. However, sometime in early December 2002, Plaintiff began to suffer from frequent bouts of severe diarrhea and abdominal pain. At this point in time, Plaintiff had moved to Delaware to join her husband. Therefore, she saw a different family doctor, Dr. Catherine Willey. Dr. Willey prescribed another round of antibiotics.

By January 2003, Plaintiff's condition had not improved, and Dr. Willey referred her to a gastroenterologist, Dr. Harold Reilly, and an infectious disease specialist, Dr. Kirsten Hauer. Dr. Reilly performed a colonoscopy on Plaintiff and collected a stool sample. Based upon lab work performed on the stool sample, Dr. Reilly diagnosed Plaintiff with *Clostridium difficile* colitis ("C. diff."), a bacterial infection of the lower GI tract. C. diff. infections typically occur in patients who have taken antibiotics for some other condition. The antibiotics disrupt the balance of natural flora living in the digestive tract, thus allowing the C. diff. bacteria to thrive.

Due to Plaintiff's frequent diarrhea, Dr. Hauer was concerned that oral medication would not remain in Plaintiff's digestive tract long enough to properly digest and absorb into her system. Therefore, Dr. Hauer prescribed IV antibiotics which needed to be administered three times a day. In order to administer the IV medication, Plaintiff needed to have an IV catheter temporarily implanted in her arm.

Over the ensuing weeks and months, Plaintiff suffered several complications related to her treatment including a blood infection from the IV catheter. She needed to be hospitalized for the infection. She also had several relapses of chronic diarrhea and abdominal pain. However, she eventually recovered from her illness and its side effects and the majority of her symptoms subsided by August 2003.

On November 1, 2004 Plaintiff filed suit alleging that Defendant was negligent in failing to warn its guests that the spa contained untreated water. Plaintiff claimed the Hotel's negligence caused her to contract hot tub folliculitis, the treatment of which caused C. diff. along with side-effects and other complications.

ANALYSIS

Under Delaware law a business owner has a duty to maintain the business's premises in a reasonably safe condition for the use of its patrons. Attendant to this duty, is a "duty to warn its customers of any latent or concealed danger." The scope of the owner's liability is well-settled:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

In the instant case, Plaintiff alleged that the untreated spa constituted a known, dangerous condition on Defendant's premises, and Defendant failed to warn Plaintiff of the danger. Defendant argues that Plaintiff failed to produce sufficient evidence from which a jury could reasonably base a finding of negligence. The Court finds that there was sufficient evidence from which a jury could reasonably so find.

DANGEROUS CONDITION

Defendant claims that "Plaintiff failed to adduce any evidence that the hot tub was a dangerous condition... The fact that Mrs. Gallo claimed to have become ill from using it is not evidence that a dangerous condition existed."

Defendant's position implies that the only evidence that Plaintiff put forth was her injury. This is clearly not the case. The evidence at trial demonstrated that Defendant's spa was filled with untreated water; Plaintiff used the spa and developed hot tub folliculitis two days later; hot tub folliculitis is caused by bacteria that are often found in spas, pools and hot tubs; hot tub folliculitis typically manifests itself within one to two days after exposure to contaminated water. Taken together, this evidence formed a sufficient basis upon which a jury could infer the existence of a dangerous condition.

Additionally, in this case Defendant's own evidence was that hotel personnel recognized the hazardous condition and posted notice to guests not to use the spa. Certainly, in those cases in which a party acknowledges an unsafe or unsanitary condition, there is no need for the opposing party to prove the condition's existence by expert testimony or otherwise. It is simply not a fact in dispute.

Therefore, viewing the evidence in a light most favorable to the Plaintiff, the jury could have reasonably concluded that the untreated water contained a high level of bacteria that would not have been there if the water had been treated. The jury could further infer that a spa filled with this type of water created a risk of harm to guests staying at the Hotel and, based on the testimony of the medical expert and the consistency of Plaintiff's experience in developing symptoms to that testimony, the jury could reasonably find the exposure and illness were causally related.

Defendant also claims that Plaintiff failed to produce evidence that the Defendant knew or should have known of the dangerous condition. This argument fails on the plain facts of the case and directly contradicts Defendant's contention that Plaintiff should not have used the spa because Hotel employees posted signs indicating that the spa was closed. The evidence shows that Hotel personnel knew that the spa was not treated with any chemicals, such as chlorine, that control water quality. Viewing this evidence in a light most favorable to the Plaintiff, the jury could reasonably conclude that the Hotel staff knew or should have known that the untreated water was not safe for guests.

Lastly, Defendant argues that "the un rebutted testimony was that the Hotel did warn Mrs. Gallo of the situation." This argument centers on the fact that Plaintiff admitted to seeing an "out of order" sign posted above the spa's timer.

The duty to warn is grounded upon the property owner's superior knowledge of a dangerous condition. "It is when this perilous condition is known to the owner and not to the invitee that recovery is permitted." Accordingly, a property owner has no duty to warn an invitee of a known or obvious danger.

Here, Plaintiff claims that she read an out of order sign but thought the sign concerned the timer only. She testified that she had no idea that the spa contained untreated water. Plaintiff testified that she saw no warnings other than the "Post-it" by the timer. Defendant did not produce the 8" x 11" out-of-order signs that were allegedly posted on the premises. The failure to produce this evidence could be concluded by the jury to discredit Defendant's claim that Plaintiff knew that the entire spa was not functioning. Viewing this evidence in a light most favorable to the Plaintiff, the jury could reasonably find that the Defendant knew the water was not treated and that the Plaintiff did not. The jury could further conclude that the out-of-order sign did not adequately warn Plaintiff of the full extent of the danger posed by the untreated water.

The presence of other warning signs was a point of much contention during the trial. Plaintiff and her husband testified that no signs were present, except for the Post-it Note sized sign over the timer that controlled the jets. Defendant's witnesses testified that there were two to three larger signs posted elsewhere in the facility. The jury was free to weigh the witnesses' credibility and accept the Plaintiff's version of the facts.

CONCLUSION

After viewing the evidence in the light most favorable to the Plaintiff, the Court finds that the Plaintiff presented sufficient evidence from which a reasonable jury could have found in favor of the Plaintiff. Therefore, Defendant's Motion for Judgment as a Matter of Law is DENIED.