

CHILD ASSUMED RISK OF DROWNING IN CLOSED POOL
RICE v. OAKS INVESTORS II

COURT OF APPEALS OF GEORGIA, FOURTH DIVISION
June 26, 2008

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

This is a tragic case involving the drowning of a 10-year-old girl in an apartment complex swimming pool. The parents of the deceased girl filed a wrongful death complaint against both the owner and the manager of the apartment complex. At the close of the evidence presented at trial, the court granted the defendants' motion for directed verdict. The plaintiffs appeal, asserting essentially three claims of error. Because the controlling case law is well-established and it is clear that the trial court properly granted the motion for directed verdict, we affirm.

A directed verdict is authorized only when there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict. We conduct a de novo review of the evidence and will uphold the grant of a directed verdict only if all the evidence demands it.

So viewed, the evidence showed that the deceased, her nine-year-old sister, and a cousin, were visiting their aunt at an apartment complex. A second cousin was also visiting, but did not leave the apartment. The aunt told the girls that they could play outside. One of the girls testified that the aunt gave them permission to go swimming in the complex swimming pool, but the aunt could not recall giving them permission.

The girls left the apartment and went to the pool where they noticed that the entrance gate was locked. The pool, surrounded by a four-foot tall fence, had been closed due to a low PH level. There was a sign posted next to the gate stating that "all children and non-swimmers must be accompanied by a parent or responsible adult supervisor." There was no lifeguard at the pool. The water was clear, and there were no defects in the pool. The girls saw a man mowing the lawn nearby and asked him if they could swim. The man, who said he "worked there," told them that they could enter through a hole in the side of the fence.

The girls entered the pool and swam until it started raining and they were told by a resident to get out of the water. When the rain stopped, the girls returned. The decedent then walked to the life-line in the center of the pool that divided the shallow water from the deep and held onto the rope. Her sister stated that she saw the decedent reach for the rope once, but that she could not reach it a second time and sank to the bottom of the pool.

Paramedics were called, but the 10-year-old later died at a local hospital. The decedent knew how to swim and had been told by her mother on other occasions never to swim without an adult present and never to swim in the deep end of the pool.

The plaintiffs argued at trial that the defendants were negligent per se for violating the College Park Swimming Pool Code. One section provided that all public swimming pools shall be

enclosed by a fence at least four feet high, and that openings in the fence shall "not permit the passage of a 4-inch diameter sphere."

In two enumerations, the plaintiffs contend that the trial court erred in granting the defendants' motion for directed verdict. The defendants conceded that the fence was not properly maintained because it had a large opening on one side. But it is well-settled that negligence per se is not liability per se and that a plaintiff must still prove proximate cause. And our courts have repeatedly held that "the danger of drowning in water is a palpable and manifest peril, and the fear of water and of drowning is instinctively present in young children as a matter of law." There is no legal bar to applying assumption of the risk, as a matter of law, to the conduct of a child between the ages of seven and fourteen when the evidence shows that the danger was obvious, that the child knew of the danger and was able to appreciate the risks associated with it, and the child voluntarily chose to run the risk..

The death of a child evokes both sadness and sympathy. But as tragic as it may be, the deceased was capable of appreciating the risk associated with swimming in the pool. We have held under similar circumstances that the child's "own negligence is the sole proximate cause" of his or her drowning. Moreover, in this case, the deceased's mother explicitly instructed the child to stay out of the deep end of a pool and never to swim without adult supervision. The trial court therefore did not err in granting the defendants' motion for direct verdict as there was no conflict in the evidence as to any material issue and the evidence demanded a defense verdict.

Judgment affirmed.