2016 IL App (1st) 151927-U

FIRST DIVISION
December 12, 2016

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No. 15-1927

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LISA MOGAN,	)	Appeal from the Circuit Court of
	)	Cook County, Law Division
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-L-8707
	)	
SCHAUMBURG PARK DISTRICT, and METRO	)	Honorable John P. Callahan,
RISK MANAGEMENT AGENCY,	)	Judge Presiding
	)	
Defendants-Appellees.	)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment for defendants on plaintiff's personal injury claim that arose from her jumping from a diving platform into a pool. The condition plaintiff encountered presented an open and obvious risk so defendants owed her no duty of care in regard to it. Defendants are also immune from liability under the Local Governmental and Governmental Employees Tort Immunity Act, and plaintiff did not produce evidence to create a question of fact as to whether defendants' conduct was willful and wanton.

¶ 2 BACKGROUND

¶ 3 The facts in the case are pretty straightforward. On August 5, 2011, plaintiff Lisa Mogan jumped off the 10 meter diving board at Meineke Pool which is operated by defendant

Schaumburg Park District. When she hit the water, she landed on and broke her back. She filed this case. The trial court granted the park district's two motions for summary judgment finding that there were five grounds on which the park district was entitled to a judgment of no liability. Mogan appeals from that judgment.

¶ 4 Some of the evidence adduced at the summary judgment stage is important to the appeal. Mogan was 43 years old at the time. She is a former lifeguard. She had jumped from high platforms before, but perhaps not as high as 10 meters. She was at the pool with her children and family friends. Her son and his friend both jumped off the 10 meter diving board just before she did and she instructed them how to jump properly to avoid injury. She chose the 10 meter diving board even though there were lower dive platforms available. There were multiple lifeguards on duty at the time and there was no evidence that any of them were in derogation of their responsibilities. In fact, the lifeguards supposedly responded quickly to assist Mogan after she was injured.

¶ 5 From 2006 to 2011, there had been 27 injuries sustained from people jumping off the 10 meter diving board at Meineke Pool. There were no warning signs posted. The diving board was inspected by the Illinois Department of Public Health the prior year and the park district had a current license for its operation at the time Mogan was injured. There is no insinuation that there was anything wrong or defective with the diving board itself. Mogan's claim is just that the diving board is too dangerous to be open to the general public where jumping from it can result in such serious injury.

¶ 6 The park district argued in the trial court and repeats here that: (1) that the diving platform and the water beneath are open and obvious dangers; (2) that it is entitled to discretionary

immunity; (3) that it is entitled to supervisory immunity; (4) that it is entitled to recreational immunity; and (5) that Mogan's claims are barred by the statute of repose. Mogan contends that the park district owed her a duty of care, that none of the immunity doctrines apply, and that her claim is timely.

¶ 7 ANALYSIS

¶ 8 We review an order granting summary judgment *de novo*. *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 8. Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012). If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 12.

¶ 9 In cases involving obvious and common conditions, such as height and bodies of water, Illinois law generally assumes that persons who encounter these conditions will take care to avoid the inherent danger. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 448 (1996). "[T]he law does not require persons to protect or warn against possible injuries from open and obvious conditions, which by their nature carry their own 'warning' of potential harm." *Id*. at 457. This is just such a case.

¶ 10 Bodies of water are ordinarily considered to be open and obvious conditions and thereby carry their own warning of possible danger. *Id*. at 455. A park district that operates a swimming pool owes no duty of care to supervise adult swimmers. *Blankenship v. Peoria Park District*, 269 Ill. App. 3d 416, 422 (1994). There is similarly no duty of care owed to an adult who jumps or falls

into the water from an artificial recreational apparatus that poses an obvious risk. *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 57 (1999). Jumping from height itself creates an obvious risk of harm. *Bucheleres*, 171 Ill. 2d at 448 (1996). Tie all of those concepts together and it is clear that no duty exists here.

¶ 11 Mogan is by law presumed to know and appreciate the risk of jumping from a diving board and hitting the water. Here, any patrons wishing to use the 10 meter board climbed that height and intentionally jumped into the water for personal recreational purposes. The park district owed Mogan no duty to protect her from the obvious risk of jumping from height into the water.

¶ 12 There is no evidence that Mogan could somehow not appreciate the risk. She is a 43 year old adult and a former lifeguard. Of all the people that should be able to appreciate the risk, she is in the highest tier. But not only is Mogan objectively expected to appreciate the obvious risk, the evidence shows that she actually did appreciate the risk and proceeded regardless. She taught her children how to jump properly from the diving board—position their bodies straight up and down with their feet together and arms at their sides. She climbed up the diving platform, looked down at the water, and took note of the height. After assessing the situation, she jumped.

¶ 13 This case is unlike our decision in *Pleasant v. Blue Mound Swim Club*, 128 Ill. App. 2d 277 (1970). In that case, the plaintiff was injured after jumping from a diving board into a pool, but the water level in the pool was not sufficiently deep so the plaintiff struck the bottom. *Id.* at 280. Based on the allegations made here, the park district did not do anything affirmatively wrong contemporaneous with the injury. Mogan's only contention is that the platform is too dangerous to be open to the general public. Mogan does not point to any expert testimony that has been offered in an attempt to demonstrate that a 10 meter diving board is inherently unsafe for adults or even

children to use. Nor is the court in any position to make a policy determination concerning the height at which diving platforms become inherently unsafe or somehow craft rules that should be imposed on pool operators. Plainly, Mogan provides no persuasive reason as to how or why the park district should be held to have protected her from assuming the obvious risk that she elected to take.

¶ 14 Mogan's whole case is basically built around the singular fact that on average four and a half people a year are injured after jumping from the 10 meter board at Meineke Pool. Relying on the existence of prior injuries, she contends that a duty should be imposed on the park district to protect patrons from the risks attendant to using the 10 meter board. But the safety data shows that jumps from the 10 meter board account for just 4.33% of the incident reports filed at Meineke Pool over the six year period leading up to Mogan's injury. She was the first adult to have to go to the hospital after jumping from the board. It is inevitable that people will get injured and even die as a result of swimming and diving into both natural and artificial bodies of water. Our statutory scheme and the attendant case law reflects a collective determination that we do not expect swimming pool owners to guarantee our safety when we consciously encounter the known risks associated with those recreational activities.

¶ 15 In addition to having no duty in this case, the park district is statutorily immune in these circumstances. The park district relies on three sections of the Local Governmental and Governmental Employees Tort Immunity Act 745 ILCS 10/1-101 (*et seq.*) to support its claim that it is immune from liability: 745 ILCS 10/2-201 (Discretionary Immunity); 745 ILCS 10/3-108 (Supervision Immunity); 745 ILCS 10/3-106 (Recreational Property Immunity).

¶ 16 Mogan tries to circumvent the park district's putative immunity by contending that there is

at least a question of fact as to whether the park district acted willfully or wantonly. Under the Local Government Tort Immunity Act, a public entity's immunity does not extend to willful and wanton conduct. The Act defines willful and wanton conduct to be "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (West 2012).

¶ 17 Mogan's only basis for arguing that the park district's conduct was willful and wanton is that about four and a half people on average get hurt jumping from the 10 meter board each year. That argument ties in with her implied assertion that 10 meter diving platforms are inherently dangerous and should not be open to the general public. According to Mogan, there is at least a question of fact as to whether the park district's inaction could amount to willful and wanton conduct.

¶ 18 First off, before liability for willful and wanton conduct can exist, the defendant must owe the plaintiff a duty of care. *Bialek v. Moraine Valley Community College School District 524*, 267 Ill. App. 3d 857, 860 (1994). Setting that aside, there is no evidence that the park district consciously disregarded the pool patrons' safety. Lifeguards from the pool testified that the type of injuries they expected to encounter were things like getting the wind knocked out of you or slapping against the water. The statistics also belie Mogan's assertions because they show that very few adults were injured as a result of using the 10 meter platform. The pool also had lifeguards on duty at all times and, contrary to disregarding the safety of those using the 10 meter board, watched those patrons that chose to use the board closely. Mogan failed to produce evidence from which we could judicially promulgate that 10 meter diving platforms are, as a matter of law, so unsafe that

the simple fact of having one constitutes willful and wanton conduct. The trial court properly held that the park district is immune from liability under the given circumstances.

¶ 19 So not only did the park district owe Mogan no duty of care, it is immune from liability under multiple sections of the Local Governmental and Governmental Employees Tort Immunity Act. The undisputed evidence does not raise a question of fact as to whether the park district acted willfully and wantonly. The trial court properly granted summary judgment for those reasons and, thus, we do not reach the other grounds on which the trial court found that the park district was entitled to a judgment of no liability.

¶ 20 CONCLUSION

¶ 21 Accordingly, we affirm.

¶ 22 Affirmed.