IN THE COURT OF APPEALS OF IOWA

No. 4-516 / 93-1957

FILED
AUG 17 1995
CLERK SUPREME COURT

MICHELLE RULE,

Plaintiff-Appellant.

vs.

THOMAS L. DUFFY and SUSAN J. DUFFY, and SWIMLINE CORPORATION,

Defendants-Appellees,

and

RANGER INDUSTRIES, INC., PRODUCTS LIABILITY TRUST

Defendant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Michelle Rule appeals the district court grant of summary judgment to appellees in her personal injury suit. **AFFIRMED BY OPERATION OF LAW.**

Edward J. Gallagher, Jr. and E.J. Gallagher III of Gallagher, Langlas & Gallagher, P.C., and Bruce B. Zager of Zager Law Firm, Waterloo, for appellant.

David J. Dutton of Dutton, Braun, Staack, Hellman & Iversen, P.L.C., Waterloo, for appellees Duffys.

Connie Alt and James D. Hodges of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellee Swimline.

Considered en banc.

PER CURIAM

The court being equally divided, the judgment is affirmed by operation of law. Iowa Code § 602.5106(1) (1995).

AFFIRMED.

For affirmance: Sackett, Habhab, and Huitink.

For reversal: Donielson, C.J., Hayden, and Cady.

CADY, J., (writing separately)

This is an appeal by a young woman rendered quadriplegic after she dove into an above-ground pool and struck her head on the pool floor. The tragic facts admittedly present a difficult legal issue of first impression in Iowa, and it is not surprising that we confront disagreement in how the issue should be resolved. This issue has met with mixed results in other jurisdictions as well. The question is whether the danger of diving into a fairly shallow above-ground swimming pool is open and obvious as a matter of law so that the pool manufacturer and owner are relieved of any duty to warn. I would conclude the danger is not open and obvious as a matter of law, and would reverse the district court's grant of summary judgment.

It is important to understand the facts of the case and the evidence submitted at the summary judgment hearing.

Michelle Rule was paralyzed on June 30, 1990 after she dove into an above-ground swimming pool located at the home of Thomas and Susan Duffy near Dunkerton, Iowa. Michelle was 21 years old at the time.

The pool was manufactured by Coleco Industries, Inc. Swimline Corporation manufactured it's vinyl replacement liner. The pool was sixteen feet wide and twenty-seven feet in length. It's sides were about four feet high, and the water depth was approximately three and one-half feet. The Thomas' constructed a small wooden deck off one end of the pool.

The railing of the pool originally contained "no diving" and "shallow water" labels. The replacement liner contained no labels or warnings.

Michelle was a moderately experienced swimmer, and generally aware of the dangers associated with diving into shallow water. She was familiar with above-ground pools, and had been in the Duffy pool on a prior occasion several years before her injury.

Michelle knew the Duffy pool was shallow. She knew it was an above-ground pool, and that the bottom of the pool was even. She believed the water level was about waist high. She intended to execute a shallow dive at the time of her injury, and believes she "struck her head because she dove too deep."

Michelle brought her action against Ranger Industries (the successor in interest of Coleco), Swimline, and the Duffys. She alleged negligence and strict liability against Swimline, claiming Swimline had a duty to warn her of the dangers of diving into the pool. She alleged the Duffys were negligent in erecting the deck, failing to warn, failing to provide adequate lighting, and failing to supervise.

The Duffys and Swimline moved for summary judgment. They claimed they had no duty of care toward Michelle because the danger of diving into the shallow water was open and obvious.

In response to the summary judgment motions, Michelle submitted affidavits and depositions from several expert witnesses. One expert opined that many swimmers are unaware of the danger of paralysis from diving into shallow water.

Another testified that only highly trained divers can consistently perform shallow dives without injury. Another testified that warnings are needed to reinforce the dangers of diving into shallow water.

The district court granted summary judgment. It concluded that the danger of diving into shallow water was open and obvious as a matter of law, and the Duffys and Swimline owed no duty of care to Michelle since she knew the shallowness of the water.

On appeal, Michelle claims a fact question has been raised whether the dangers of the pool were open and obvious. I agree.

I. Summary Judgment

In reviewing a grant of summary judgment, like the trial court, we first determine whether any genuine issues of material fact are in dispute. *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 338 (Iowa 1991). If there are none, then we determine whether the trial court correctly decided the moving party was entitled to judgment as a matter of law. *Id.* The moving party has the burden of demonstrating there is no genuine issue of material fact. *Colton v. Branstad*, 372 N.W.2d 184, 188 (Iowa 1985). Every legitimate inference that reasonably can be deduced from the evidence is afforded the nonmoving party, and a fact question is present if reasonable minds can differ on how the issue should be resolved. *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984).

II. Swimline

We follow the Restatement (Second) of Torts section 388 (1965) in defining the duty of a manufacturer to warn of the dangerous qualities of a product.[1] *See Nichols v. Westfield Indus., Ltd.*, 380 N.W.2d 392, 400-401 (Iowa 1985); *Henkel v. R & S Bottling Co.*, 323 N.W.2d 185, 188-90 (Iowa 1982). Generally, a duty to warn is imposed when the manufacturer has actual or constructive knowledge of the danger, and has no reason to believe the product user will realize the dangerous condition.[2] Where the risks are open and obvious, however, there is no need to provide a warning. *Nassif v. National Presto Ind., Inc.*, 731 F. Supp. 1422, 1425 (S.D. Iowa 1990); *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 569-70 (Iowa 1986); *Nichols*, 380 N.W.2d at 401. *See also Garnes v. Gulf & Western Mfg. Co.*, 789 F.2d 637, 640 (8th Cir. 1986) (holding manufacturer had no duty to warn under Iowa law when danger was obvious).

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[1]Although Michelle's lawsuit against Swimline alleged both strict liability and negligence claims, a failure to warn claim can only be based on the theory of negligence. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994).

[2]The Restatement (Second) of Torts § 388 states in relevant part that the manufacturer or seller of a chattel is subject to liability to an expected user of the chattel if the manufacturer or seller:

> (a) Knows or has reason to know that the chattel is likely to be dangerous to the use or has been supplied,
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
> (c) fails to exercise reasonable care to inform users of its dangerous condition or the facts which make it likely to be dangerous.

The rationale for the no-duty rule is that nothing is gained by shifting the responsibility to warn to the manufacturer when the consumer is in just as good a position as the manufacturer to gauge the dangers associated with the product. *Laaperi v. Sears, Roebuck & Co. Inc.*, 787 F.2d 726, 730-31 (1st Cir. 1986); *Glittenberg v. Doughboy Recreational Ind.*, 491 N.W.2d 208, 213 (Mich. 1992). Actual knowledge of a danger is equivalent, and perhaps even superior, to a warning. *Hanson v. Town & Country Shopping Center Inc.*, 259 Iowa 542, 546, 144 N.W.2d 870, 873 (1966). The legal responsibility to warn should serve to protect consumers from harm, not expose manufacturers to liability for injuries from dangers that are readily apparent to consumers.

The court determines the circumstances which give rise to a duty. *See Teunissen v. Orkin Exterminating Co.*, 484 N.W.2d 589, 591 (Iowa 1992). Thus, if the danger involved with a product is open and obvious, the manufacturer is entitled to judgment as a matter of law. *Lamb by Shepard v. Sears, Roebuck & Co.*, 1 F.3d 1184, 1190 (11th Cir. 1993). Whether a danger is open and obvious, and whether the plaintiff sufficiently appreciated the danger to obviate the duty, however, are generally recognized to be questions of fact for the jury. *Sandry v. John Deere Co.*, 452 N.W.2d 616, 619 (Iowa App. 1989) (jury question generated whether it was an open and obvious danger to place hand near unguarded fan while motor was running); *Bandstra v. International Harvester Co.*, 367 N.W.2d 282, 287 (Iowa App. 1985) (jury question presented whether plaintiff sufficiently appreciated known danger).

See Beeman v. Manville Corp. Asbestos Disease Compensation Fund, 496 N.W.2d 247, 252 (Iowa 1993) (whether warning of product danger should be given is a question for the jury). While this rule results in the rejection of requests for summary adjudication in most cases, it does not relieve us from our obligation to carefully consider if this case presents an exception. If a danger is plainly open and obvious, the question should be decided as a matter of law. *Lamb by Shepard*, 1 F.3d at 1190. Passing the question to the jury in each case only postpones the court's difficult decision-making task to another day. *Gluttenberg*, 491 N.W.2d at 211. Other unwanted consequences attach as well. An objective test is utilized to determine whether a danger associated with a product is obvious. *Id.* at 213. The focus is on the perception and knowledge of the ordinary user of the product, and whether the relevant condition responsible for the danger associated with its use is fully apparent, widely known, commonly recognized and anticipated by the typical user. *Id.*; *see* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 96, at 686-87 (5th ed. 1984); Restatement (Second) of Torts § 402A cmt. i.; *see also Maguire*, 387 N.W.2d at 571 (risks sufficiently known to consumers at large); *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 547 (Iowa 1980) (knowledge of the ordinary user should be considered in determining whether use of product was reasonably foreseeable).

Our appellate courts have not previously addressed the issue whether the dangers of diving head first into a fairly shallow above-ground pool are open and obvious. Other jurisdictions have done so with mixed results. Several states which

have considered the question have refused to impose a duty to warn as a matter of law. *See Glittenberg*, 491 N.W.2d at 211 n.4. Other jurisdictions have concluded that the question should be left to the finder of fact. *See Corbin v. Coleco Indust. Inc.*, 748 F.2d 411, 417-18 (7th Cir. 1984); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 119-20 (3d Cir. 1992) (diving into pool of uncertain depth).

In deciding this difficult question, it is important to first consider the facts in a light most favorable to Michelle. Although the evidence reveals Michelle knew the depth of the pool prior to executing her dive, and was generally aware of the risk of injury involved in diving into shallow water, I primarily focus on the testimony of her expert witnesses. These experts testified about the frequency of diving injuries and that the general public is unaware of the danger of paralysis from diving into shallow water. The evidence also suggests that pool users generally do not understand how easy an intended shallow dive can transform into a deep dive.

The evidence submitted by Michelle draws a distinction between knowledge and appreciation of the general risks of danger, as opposed to the specific risks. The question is whether this distinction impacts the open and obvious rule.

In *Glittenberg*, the court held that where the general danger associated with using a product is open and obvious, there is no duty to warn of the specific risks which may be latent. *Glittenberg*, 491 N.W.2d at 218-18. Confronting facts nearly identical to the relevant circumstances in this case, the *Glittenberg* court concluded that "the law does not impose a duty upon a manufacturer to warn of all conceivable

ramifications of injuries that might occur from the use or foreseeable misuse of the product." *Id.*

On the other hand, the court in *Corbin*, a case with similar facts to those in this case, found the general awareness of the danger of diving into a shallow swimming pool did not eliminate the duty to warn as a matter of law. *Corbin*, 748 F.2d at 419-20. In concluding that the plaintiff presented sufficient evidence to generate a jury question to the open and obvious defense, the court stated:

> Whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see. In particular, if people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious.

Id. at 417-18.

I find the reasoning in *Corbin* persuasive. The no-duty rule is premised on the ability of ordinary consumers to protect themselves through their own observations. It rests not only with the characteristics of the particular product, but also with the ability of the ordinary consumer to sense and comprehend the danger inherent in those characteristics. Knowledge by the ordinary consumer of the general risks of harm involved in the use of a product does little to protect the consumer who fails to comprehend a more specific and catastrophic injury, or falsely believes there is a safe way to avoid the danger. The no-duty rule is not intended to provide less protection

to the ordinary consumer, but the same protection as a warning from the manufacturer would provide.

A rule which relieves the manufacturer of its obligation to warn because the general risks of the product are open and obvious necessarily assumes that only general warnings are needed in each instance to adequately protect the ordinary consumer from harm. The evidence in the case, read in a light most favorable to Michelle, does not support such an assumption. Accordingly, I believe a jury question is presented.

I do not intimate that a manufacturer must warn of all conceivable injuries.[3] Moreover, I would not articulate a rule of law which imposes a duty on a manufacturer of an above-ground pool or its component parts to warn consumers that diving into the pool may result in paralysis. Instead, I recognize the existence of a duty for manufacturers to warn of known dangers if the dangers are not open and obvious to the consumer, and would only hold that the question of whether diving into a four-foot above-ground pool is open and obvious cannot be decided as a matter of law under the facts presented.

I would also reject the other issues raised by Swimline. In particular, I would find that the question of whether the lack of warnings was a proximate cause of the

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[3]A manufacturer is not required to enumerate all the possible injuries which might result from the use of a product in order to be protected from liability for negligence. *Jamieson v. Woodward & Lothrop*, 247 F.2d 23, 30 (D.C. Cir. 1957).

injuries is for the jury. I would also conclude that Swimline's role as a manufacturer of a component part does not limit their liability as a matter of law. *See Fleck*, 981 F.2d at 117-119.

IV. The Duffys

The duty of a possessor of land to warn invitees of danger on the premises is similar to the duty of a manufacturer to warn consumers of the danger involved in a product. A possessor is obligated to make the premises reasonably safe or warn of the dangerous conditions on the land. *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990). Like the manufacturer, the possessor has no duty to warn against dangers which are known or obvious. *Id.* at 618; Restatement (Second) of Torts § 343A. It is recognized, however, that when the possessor can and should anticipate under the circumstances that the dangerous condition will cause physical harm to an invitee even though the danger is known and obvious, the duty to warn or protect remains intact. *Konicek*, 457 N.W.2d at 618; Restatement (Second) of Torts § 343 A, cmt. f.

As with the manufacturer, I believe the determination of whether the danger in this case was known or obvious should be decided by the jury. Moreover, the possessor is not conclusively relieved from liability once the danger is known or obvious. *Id.* If the possessor of land has reason to expect a visitor will proceed to encounter a known danger because, under the circumstances, the visitor reasonably

believes the advantage of doing so outweighs the apparent risk, the duty to warn is imposed on the possessor. *Id.*

I believe the circumstances of this case present a jury question. I would reverse the summary judgment, and remand for further proceedings.

SACKETT, J. (writes separately for affirmance)

I would affirm the trial court finding on summary judgment.

Twenty-one-year-old plaintiff Michelle sought damages, following her injury from diving into an above-ground pool, from the manufacturer of the above-ground pool and of its component parts and of the possessor of the land.

Michelle's case focused on the alleged failure of defendants to warn.

The trial court ruled for defendants on summary judgment holding defendants had no duty to warn because Michelle knew the depth of the water and the risk of diving into shallow water is obvious.

The only conclusion which can be drawn from the record is that Michelle knew the water was shallow and Michelle was generally aware of the risk of diving.

In *Nelson v. Langstrom*, 252 Iowa 965, 971, 108 N.W.2d 58, 61-62 (1961), the Iowa court, in addressing liability of a pool owner to a person diving, said: "The depth of the water in this case was not a defect or danger to plaintiff if he knew the depth."

Actual knowledge of a danger is equivalent, and perhaps even superior, to a warning. *Hanson v. Town & Country Shopping Center Inc.*, 259 Iowa 542, 546, 144 N.W.2d 870, 873 (1966).

Diving in shallow water is not unique to the product. Shallow water exists in most swimming pools and in nearly every natural waterway.

Michelle made an unfortunate decision and was unlucky. She dove into the pool knowing the depth of the water and the risk of diving in shallow water.

There is no factual issue. Because the danger is open and obvious, the defendant is entitled to judgment as a matter of law. *Lamb by Shepard v. Sears, Roebuck & Co.*, 1 F.3d 1184, 1190 (11th Cir. 1993).