

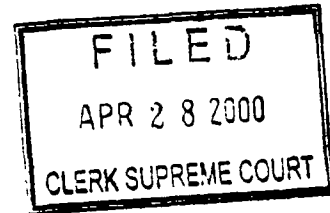
IN THE COURT OF APPEALS OF IOWA

No. 9-701 / 98-1467
Filed April 28, 2000

JESSE SOLINGER,
Appellant,

vs.

CARMEN DAVENPORT and POOLS OF IOWA, INC.,
Appellees.



Appeal from the Iowa District Court for Polk, Robert A. Hutchison, Judge.

Jesse Solinger appeals the district court's grant of summary judgment in favor of Carmen Davenport and Pools of Iowa, Inc., in his personal injury action.

AFFIRMED.

Brent A. Cashatt and Andrew B. Howie of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney & Shindler, P.C., Des Moines, for appellant.

Richard G. Langdon of Herrick, Langdon & Langdon, Des Moines, for appellee-Carmen Davenport.

F. Richard Lyford and Michele M. Greubel of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellee-Pools of Iowa, Inc.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

000282

VOGEL, J.

Plaintiff. Jesse William Solinger, appeals the district court's grant of summary judgment for the defendants, Carmen Davenport and Pools of Iowa, Inc. (Pools), in his personal injury action.

Background facts. In June of 1995, Solinger sustained serious head and neck injuries when he dove off a diving board and struck his head on the bottom of Davenport's inground pool. He faults both Davenport, as owner, and Pools, as the maintenance company, for his injuries. Specifically, he alleges that Pools negligently installed a new liner over the sand bottom, allowing the bottom to shift over time and change the contour and depth of the pool. The trial court found Solinger failed to respond to the motion for summary judgment with admissible testimony or set forth a material fact in dispute to support his claim.

Scope of review. On appeal, we review a summary judgment ruling for error. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 354 (Iowa 1995). Summary judgment may be entered if the record shows "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 237(c). Thus, "we examine the record before the district court to decide whether a genuine issue of material fact exists and whether the court correctly applied the law." *Benavides*, 539 N.W.2d at 354. In doing so, we view the facts in the light most favorable to the party opposing the motion for summary judgment. *Hagen v. Texaco Refining & Mktg., Inc.*, 526 N.W.2d 531, 538 (Iowa 1995).

"[T]he moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law."

~~Wilson v. Dwyer, 553 N.W.2d 579, 582 (Iowa 1996).~~ In order to accomplish this, the moving party may rely on the pleadings, affidavits, depositions, interrogatory answers, or admissions on file. *Id.* The party resisting the motion must establish the existence of a genuine issue of material fact. *Bitner v. Ottumwa Community School Dist.*, 549 N.W.2d 295, 299 (Iowa 1996). "[A]n adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.*

I. Defendants' motion for summary judgment. Defendant Pools, alleging there was no material fact in dispute, moved for summary judgment. Defendant Davenport later joined the motion. In support of the motion for summary judgment, Pools provided a statement from Dwight Hunnell, President of Pools, along with supporting exhibits. Hunnell provided measurements of the pool's various depths prior to the 1993 liner replacement. He also stated that upon remeasuring the pool in August of 1997, he found the later measurements "conform closely to the configuration of the pool" from 1993 and conformed to the specifications of the pool as it was originally built in 1983. There was no dispute as to the safety of the pool pursuant to the original specifications.

II. Plaintiff's resistance to defendants' motion for summary judgment.

Solinger alleges the trial court erred in determining no genuine issue of fact existed. Once the movant in a motion for summary judgment has provided evidence that there is no genuine issue of material fact, the burden moves to the

resisting party to clearly establish that there remains an issue in dispute to send to a jury. Iowa R. Civ. P. 237(e).

A. Expert witness. We preface our review of Solinger's resistance to the motion for summary judgment by noting the motion was filed on November 28, 1997. After additional discovery was allowed and several deadlines were extended, the motion came on for hearing on June 10, 1998. The trial court found numerous deficiencies in Solinger's compliance with both discovery and in resisting the motion for summary judgment. In its ruling, the court stated:

Plaintiff's expert has failed to identify what standards govern Pools of Iowa in this situation, or what duty he believes defendant has to plaintiff. Only his conclusion is stated, with no statement of the grounds underlying his opinion. . . . Defendants cannot be left in a situation where they do not know the bases for plaintiff's expert's opinion. Not only does it make defendants' efforts in obtaining summary judgment impossible, but it makes it impossible as well for defendants to know what experts, if any, they need to retain for trial.

Giving Solinger the benefit of additional time before ruling on the motion, the court continued the hearing until July 16, 1998. Solinger then supplemented his resistance to summary judgment by expanding on a report by Charles Haines, a safety consultant, who expressed the opinion that both Pools and Davenport failed in various ways to provide Solinger with a safe pool to use.

After the delayed hearing, the court, citing Iowa Rules of Evidence 702¹ and 703², found the expanded testimony of Haines would be inadmissible at trial

¹ "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Iowa R. Evid. 702.

for lack of proper foundation and not being able to aid the finder of fact. Without admissible testimony on Solinger's claim of negligence, the court concluded there remained no material fact in dispute. Our concern on appeal is to review this finding of the trial court.

The determination to admit or refuse to admit evidence lies initially in the discretion of the trial court, and we will not reverse except when an abuse of discretion is shown, as where the evidence is clearly irrelevant or prejudicial. *State v. Moore*, 276 N.W.2d 437, 441 (Iowa 1979); *State v. Cassady*, 243 N.W.2d 581, 583 (Iowa 1976).

Solinger's argument centered around his belief the configuration of the pool was altered when Pools installed a new liner in 1993. Haines was retained to articulate and support this theory to the jury. He relied upon deposition testimony of Solinger and Davenport to support his theories of defendants' negligence. However, the depositions did not contain substantial evidence of pool depth measurements. Solinger testified he was present when others measured the pool depth at "roughly seven feet" in 1997. He also testified that the measurement was memorialized on paper. No deposition testimony or affidavit of the person who allegedly performed the measurement was presented by Solinger in his resistance to the motion for summary judgment. Solinger resisted, on work product grounds, a request for production of the

² "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Iowa R. Evid. 703.

memorandum of the pool measurements and did not offer it in support of his resistance. Thus, Solinger's resistance amounted to little more than an expansion of the allegations in the original petition. Most critically, Haines failed to offer any comparison of the initial pool measurements and the alleged alterations to dispute defendants' proffered testimony. His report concluded the accident occurred due to the negligence of the defendants but was devoid of any factual support for his conclusions.

Based on our review of the record, we find the trial court did not abuse its discretion in finding the proffered expert testimony of Haines would not be admissible at trial.

In addition to the proffered testimony of Haines, Solinger asserts the expert witness list he submitted to the court contained another expert witness, Bernard Nall. However, his resistance to summary judgment lacked any admissible evidence to the trial court which Nall may have provided to put a material fact in dispute.

The trial court was left with the undisputed evidence of the defendants that the depths and contours of the pool were essentially unchanged from the original installation specifications. Having found no evidence to support Solinger's contention that the depth of the pool had been altered, the trial court found no genuine issue of material fact remained for a jury to consider.

B. Premise liability. Finally, Solinger contends there is a genuine issue of material fact as to defendant Davenport's liability, in the context of premise liability. Davenport, as the owner of the premises, had a duty of care to any and all invitees that made use of the pool.

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 that 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.

Richardson v. Commodore, Inc., 599 N.W.2d 693, 696 (Iowa 1999).

Nothing in the record for the motion for summary judgment disputed that the pool, as originally constructed and installed, was safe for diving. The only evidence Solinger points to was Davenport's observation of tiny holes in the liner that led to her having it replaced in 1993. There was no proffered testimony that Davenport knew or should have known of any safety concern prior to the accident. Therefore, Davenport had no duty to warn Solinger of the defect he now alleges caused his injuries.

Conclusion. There was no evidence proffered to contradict defendants' statement of material facts. Because we find Solinger failed to establish there was a genuine issue of material fact in dispute, we find the trial court did not err in granting the motion for summary judgment. Having considered all other arguments, we affirm the trial court.

AFFIRMED.

000188