



www.releaselaw.com

www.kmksc.com

The Washington Building
4650 N. Port Washington Road
Milwaukee, WI 53212
Telephone: 414-962-5110
Facsimile: 414-962-8725

Michigan Court Rules in Child Drowning Case (Pool Owner Not Liable) and Cheerleader Injury Case (Coaches and Organization May Be Held Liable)

By Alexander "Sandie" Pendleton of KMK

The Michigan Court of Appeals recently has issued decisions in two cases involving recreational liability (*Estate of Wheeler v. Central Michigan Inns, Inc.*, April 14, 2011, and *Sherry v. East Suburban Football League*, March 17, 2011). Both decisions emphasize the importance of recreational-opportunity providers being vigilant about injury risks.

The *Wheeler* case arose out of the tragic drowning death of five-year-old Domonique "Dom" Wheeler. Dom's mother had arranged to hold a "pool party" at a local motel to celebrate Dom's upcoming birthday. On the day of the incident, Dom went with his mother and five other children to the pool. Dom's mother was the only adult at the party, and during the course of the party, she became distracted from observing the children in the pool. When, after a brief period of time (what she described as no more than a minute to a few minutes), she again focused her attention on the children in the pool, she saw Dom lying on the bottom of the pool, at a depth of about five feet. Resuscitation attempts were unsuccessful.

Ms. Wheeler sued the motel, bringing claims of wrongful death, nuisance, and loss of consortium. The motel moved for summary judgment, arguing there was no premises liability because the pool complied with all applicable regulations, and the depth of the pool presented an open and obvious danger to a non-swimming five-year-old child. The trial court granted summary judgment. Ms. Wheeler moved for reconsideration, arguing that her claims were based in negligence, not premises liability, and the trial court granted her motion. The motel then renewed its motion for summary judgment, arguing that there was no basis for Ms. Wheeler's negligence claim, because Dom's death was caused by a lack of supervision, and that the motel had no legal duty to supervise Dom. The trial court granted the motel's renewed motion.

On appeal, the plaintiff argued that, because Dom was a child invitee to the property, the motel owed Dom "the highest duty of care" and had a duty to supervise the pool and minor invitees. The court first held that in Michigan "the highest duty of care" standard applies in premises liability claims only, and that because the plaintiff's claim was for negligence, that standard had no application in the case. The court went on to hold that a property owner's duty to supervise children who are on the property by permission only arises in Michigan when the minor is *unaccompanied* by a parent, and the property owner has *voluntarily assumed* a duty to supervise that child. In so holding, the court contrasted the situation in this case (minor accompanied by mother, and property owner not voluntarily assuming a duty to supervise) with the situation in another recent Michigan court of appeals case, *Sherry v. East Suburban Football League*.

In *Sherry*, a high school student (Jessica Sherry) attended a day-long "cheer camp" (unaccompanied by either of her parents), that was organized by a local youth sports organization. The cheerleaders with whom Jessica was working were "horsing around" while practicing components of a "lift and drop" stunt. The coach assigned to supervise the group was informed of what was occurring, and threatened the girls with having to "run laps if they dropped" Jessica. The coach was supposed to be present when the group attempted full stunts, but left the group to attend to other groups. Jessica had never before performed the particular lift and drop stunt (considered an "advanced cheerleading stunt") on which the group was working. Despite the coach being gone, the group attempted the full stunt, and Jessica sustained injuries when she was dropped. Jessica's mother sued the sponsoring organization, the organization's cheer coordinator, and the "missing in action" coach.

The trial court in *Sherry* granted summary judgment to the defendants, based on the court's belief that the plaintiff had an obligation to prove reckless behavior on the defendants' part, and that the plaintiff had failed to present sufficient evidence of reckless behavior. On appeal, the court of appeals reversed, holding that the heightened "reckless" standard applies only when a participant in a recreational activity seeks to hold *another participant* in the activity liable for the participant's injuries. The court indicated that the trial court had erred when it failed to apply the lower "ordinary negligence" standard to Jessica's claims, which were only against the organization and its coaches (not other participants). Somewhat chillingly for providers of recreational opportunities, the court in *Sherry* notes: "Coaches and organizations can expect to be sued for their carelessness." The cheerleader's injury claim in *Sherry* therefore survived summary judgment, and was remanded for trial.

In terms of the lessons that can be learned from these two cases, the *Wheeler* drowning decision teaches that a commercial owner of a pool should make sure it knows what safety regulations are applicable to its pool, and then make sure its pool is in compliance at all times with those regulations. The outcome of the decision would likely have been different had the pool owner in this instance not been in compliance with the applicable regulations. From a risk management perspective, commercial pool owners should designate a specific employee or independent consultant whose job description includes the task of remaining current on applicable pool regulations, and certifying in writing on a periodic and established basis that the pool has been inspected, and that it is in compliance. Where local or state regulations are either inadequate or non-existent, a commercial pool owner should designate a reasonable written industry standard, and ensure that its pool stays compliant with that standard. Businesses and organizations that operate recreational facilities similar to pools should take a similar approach.

The lesson in the *Sherry* cheerleading case is that, when an organization has adopted a participant safety policy (such as in *Sherry*, where the organization had a policy that a coach must be present whenever a group attempted an "advanced" stunt), the organization must ensure that adequate staff members are present, so the policy can be followed. The failure to follow such a policy will likely result in liability.

The *Wheeler* and *Sherry* cases also show that, while compliance with rules, regulations and policies may ultimately save a recreational provider from having to pay an injured party liability damages, such compliance does not guarantee that a recreational provider will not incur expenses associated with defending against claims. Because such expenses can be considerable, a facility's risk management plan should also include an adequately-designed insurance component, so when injuries and claims occur, resources exist to cover investigation and defense expenses.

As always, if we at KMK can assist your club or organization in improving its legal risk-management program or agreements, contact us.

Alexander "Sandie" Pendleton
Sports, Fitness & Recreational Team Leader
Kohner, Mann & Kailas, S.C.
Milwaukee, Wisconsin
p: (414) 962-5110
e: apendleton@kmksc.com
firm sports website: www.releaselaw.com
firm general website: www.kmksc.com

About Pendleton: Alexander "Sandie" Pendleton is a shareholder with the Milwaukee law firm of Kohner, Mann & Kailas, S.C., and is the leader of the firm's Sports, Fitness and Recreational (S/F/R) Team. Sandie has over twenty years of experience counseling clients involved in sports and recreational activities, including power sports activities, and is a frequent speaker and writer on recreational liability issues. To learn more about Sandie and the KMK S/F/R Team, visit www.releaselaw.com.

About Kohner, Mann & Kailas, S.C.: At Kohner, Mann & Kailas, S.C., we continue to believe the right to the "Pursuit of Happiness" is a right worth preserving. Our S/F/R Team guides and fights for businesses and organizations that provide recreational opportunities and products, so that our clients are not overwhelmed by liability that might otherwise threaten their continued success (or even existence). Preserving the right is often not an easy or simple task, but we know this mission is an important one to our clients, and to the future of a free society. If you would like to explore whether we can help your organization achieve its mission, contact us. Founded in 1937, KMK provides legal expertise across the numerous areas of law encountered by businesses in the normal course of their day-to-day operations and growth. In addition to our S/F/R services, our services range from high-profile appellate representation and international business issues, to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and effectively. (Please note: KMK case summaries and alerts do not constitute legal advice; for specific legal questions, consult with an experienced attorney.)

www.releaselaw.com

www.kmksc.com