COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1736

COMFORT GAYYEAN & another[1]

vs.

CITY OF LOWELL.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiffs appeal from a judgment of the Superior Court, entered following allowance of the defendant's motion for summary judgment, dismissing the complaint claiming that the defendant's negligence caused the wrongful death of Eddie K. Gayyean (decedent), a seventeen year old student at the Lowell public high school. We conclude that the question whether the decedent must have known and understood the risks posed by the unguarded swimming pool in which he drowned is one of fact, rather than law, and should have been reserved for consideration by a jury. We accordingly reverse the judgment of dismissal and remand the case to the Superior Court for further proceedings.

[1] Ohnexxt Gayyean, together as administrators of the Estate of Eddie K. Gayyean.

For purposes of our decision, we assume that the summary judgment record adequately established that the decedent was a trespasser when he entered the pool area; it is undisputed in the summary judgment record that he was not authorized to be in that area at the time of his drowning, and he gained entry to the area through the girls locker room (where he likewise was not authorized to be present).[2] A landowner's duty to adult trespassers is limited to avoiding "wanton and willful misconduct." Soule v. Massachusetts Elec. Co., 378 Mass. 177, 180 (1979). Pursuant to G. L. c. 231, § 85Q, however, landowners owe a heightened duty of reasonable care to trespassers under the age of eighteen if, among other things, "(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it." "Whether a teenager actually appreciated a particular hazard is a question of fact." Puskey v. Western Massachusetts Elec. Co., 21 Mass. App. Ct. 972, 974 (1986). Only where no rational view of the evidence permits a finding of negligence may the question be decided on summary judgment. See Roderick v. Brandy Hill Co., 36 Mass. App. Ct. 948, 949 (1994).

[2] We note as well that the plaintiffs' complaint described the decedent as a trespasser on school grounds in its allegations supporting count two.

In the present case, the summary judgment record, viewed in the light most favorable to the plaintiffs, reveals that the decedent did not know how to swim. There was no evidence concerning his familiarity with swimming pools.[3] As of the date of an inspection report dated August 20, 2012 (two weeks after the decedent's death), the swimming pool did not have markings (required by State law) to indicate its depth. See 105 CMR 435.12(1) (1998). As the motion judge observed at the hearing, though the evidence in the summary judgment record was inconclusive concerning whether the doors to the pool area were all locked, it was a fair inference that the decedent was able to gain access to the pool area through an unlocked door. On this record, we do not agree with the motion judge's conclusion that no rational view of the evidence would permit a finding that the decedent was unaware, due to his age, of the risk posed by the unguarded swimming pool.

Phachansiri v. Lowell, 35 Mass. App. Ct. 576, 579 (1993), upon which the motion judge relied, is not to the contrary. In that case, we affirmed a judgment for the defendant city that rested, in part, on the jury's answer to a special question concerning the applicability of c. 231, § 85Q. Observing that

[3] Though there is no evidence in the summary judgment record on the point, the plaintiffs' counsel represented at the summary judgment hearing that the decedent "had just recently come from Liberia, where there are no pools."

the Restatement (Second) of Torts, § 339, comment j. on clause (b) (1965), recognizes that "many dangers, such as those of fire and water . . . under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large," we said that "[t]he jury could have concluded that the danger of water in a pool is one that could reasonably be expected to be fully understood and appreciated" by the children involved in that case. Id. For present purposes, we note, first, that the quoted language from the Restatement uses the permissive "may," and does not suggest that the conclusion is compelled as a matter of law. In addition, we conducted our review of the jury's determination of that question of fact, noting that the jury "could" have reached such a conclusion.[4] Nowhere did we intimate that no rational view of the evidence could support a different conclusion by the

[4] The decision identified an alternative possible ground to support the judgment: that "the jury could have concluded that the condition to be assessed was the entire pool area encompassing not only the pool but also the two fences, which encircled the perimeter of the pool, and which could have been viewed by the jury as attenuating any unreasonable risk of harm to the children" (citations omitted). Id.

trier of fact.

Judgment reversed.

By the Court (Green, C.J., Vuono & Henry, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: April 26, 2021.

[5] The panelists are listed in order of seniority.