Ready for the Defense

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Diving off pier into lake of unknown depth is open & obvious danger

This month's column involves the question of whether diving off a pier into a lake of unknown depth presents an "open and obvious danger" of striking one's head on the bottom of the lake and becoming paralyzed, such that the pier owner is not liable to plaintiff for such injury.

In the recent case of *Bujnowski v. Birchland, Inc. d/b/a Fourth Lake Resort*, 2015 IL App (2nd) 140578, 37 N.E.3d 385 (2nd Dist. 2015), Plaintiff Bujnowski sued Defendant Birchland, Inc. d/b/a Fourth Lake Resort, claiming he dove off a pier at Defendant's resort and broke his neck and claiming the resort was negligent in failing to warn him that the lake was too shallow to dive into.

Plaintiff Bujnowski was 6 feet, 4 inches tall and an experienced swimmer and had been to the resort on two prior occasions. He had no idea how deep the lake was and he saw other people do flat dives off of the pier. There was no warning sign on the pier stating the lake was too shallow for diving off the pier. But, the resort posted a large sign stating: "NOTICE" and listing Beach Regulations, which included, among others, the following: "Diving in shallow water is not permitted." There was no diving board and no lifeguard at the lake. Bujnowski claimed he was a paying customer and the Defendant resort had a duty to exercise reasonable care for his safety, including a duty to warn him of the danger of shallow dives off the pier and hitting his head on the bottom of the lake and causing him injuries.

The trial court granted Defendant Bujnowski's motion for summary judgment, finding the danger of a head injury caused by doing a shallow dive off the pier into water not knowing the depth of the water there was an open and obvious danger appreciated by any person. The Appellate Court affirmed the summary judgment for Defendant Birchland, holding the danger of injury was open and obvious to all because:

> '[A] reasonable adult in plaintiff's position would recognize that an attempt to execute a head-first flat dive into the lake, without prior awareness of the depth of the waters, might result in severe injury from hitting one's head on the lake bottom.'

The Appellate Court relied upon the Illinois Supreme Court decision in *Bucheleres v. Chicago Park District*, 171 Ill.2d 435, 665 N.E.2d 826 (1996), which involved two separate lawsuits where plaintiffs sued the Chicago Park District where they became paralyzed diving off concrete seawalls into Lake Michigan and the Supreme Court ruled the Park District was not liable to the plaintiffs, not negligent in causing their injuries because of inadequate warnings painted on several spots on the concrete retaining wall, because the danger of diving head first into a lake of unknown depth was an open and obvious danger everyone knew and appreciated, so the Park District need not warn persons not to dive off the concrete retaining walls because it was dangerous.

Stating the "open and obvious danger/no duty of landowner to warn of" rule, the Supreme Court reasoned:

> the general principle that possessors of land 'are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious.' This is because '[t]he open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks.'

The Appellate Court, after relying upon the Supreme Court *Bucheleres* case, also cited two Appellate Court decisions holding the open and obvious danger rule precluding the liability of a landowner for a diving accident where plaintiff did not know the depth of the lake and dove into it taking a chance that it was deep enough to dive into safely. The Appellate Court cited these no liability under the open and obvious danger rule cases:

> *Hagy v. McHenry County Conservation District,* 190 Ill.App.3d 833, 836, 546 N.E.2d 77 (1989) (plaintiff dived into swimming hole without ascertaining depth of water); *Sumner v. Hebenstreit,* 167 Ill.App.3d 881, 886, 522 N.E.2d 343 (1988) (plaintiff dived into water-filled sand pit without ascertaining depth of water)).

The Appellate Court held that there is a 4-factor test used to determine when and if a landowner owes a duty to warn persons coming onto the property about conditions posing a danger or guard against injury to them. And, that 4-factor test showed Defendant Birchland owed Plaintff Bujnowski no duty to warn him or protect him from the open and obvious danger of diving into a lake without knowing the depth of the lake and whether it was safe to dive into.

The Court explained the first two factors of the 4-part test the Supreme Court applied in *Bucheleres*, which revealed Defendant owed Plaintiff no duty, stating:

> [(1)] *reasonable* foreseeability of open and obvious conditions takes into account that * * * people are generally assumed to appreciate the risks associated with such conditions and therefore exercise care for their own safety.' Further, in cases involving open-and-obvious dangers, 'the law generally considers [(2)] the likelihood of injury slight * * * because it is assumed that persons encountering the potentially dangerous condition of the land will appreciate and avoid the risks.' Thus, the first two factors will practically always favor the defendant in a case involving an open-and-obvious condition, at least where no exception is available. The first two factors greatly favored the District against the plaintiffs.

And, discussing the last two factors of the Supreme Court decision in *Bucheleres*, the Appellate Court found no duty, stating:

> The court then addressed the two remaining factors: (3) the burden on the defendant of guarding against injury and (4) the consequences of placing that burden on the defendant. The court concluded that they also favored the District. Requiring the District to take steps sufficient to prevent diving, such as fencing off the seawall areas or increasing the enforcement of the existing prohibition on diving, would create a substantial economic and practical burden. Moreover, the consequences of that burden might include curtailing the public's access to the lakefront and the beaches. Thus, the balance of factors compelled imposing no duty.

Explaining that Defendant Birchland was not liable for Plaintiff's injuries under the *Bucheleres* decision because diving into a lake of an unknown depth poses an open and obvious danger, the Appellate Court stated:

> We must now apply the foregoing analysis to the undisputed facts of this case. Based on *Dowen* and *Bucheleres,* we hold first that the risk in this case was open and obvious. *Bucheleres* cited several other opinions for the general rule that diving into water of an unknown depth presents an open-and-obvious risk, and our opinions in *Bezanis* and *Suchy* reiterated this general rule. Thus, the first part of our inquiry is easily resolved: the risk was open and obvious.

The Appellate Court continued its explanation of why the open and obvious danger rule protected Defendant Birchland from any liability for Plaintiff Bujnowski's injuries, the Court stated:

> Second, the *very uncertainty* of the water's depth places the onus of accuracy on the person who chooses to dive into it. The danger is 'open and obvious' *not* because the plaintiff knows in advance that the water is shallow, but because he knows in advance *that it is a body of water and thus might be* too shallow for a safe dive. If the plaintiff guesses wrong, he cannot be heard to argue that his lack of ' "prior awareness of the depth of the waters" '

Concluding that Plaintiff Bujnowski had no claim/no cause of action against Defendant Birchland, the Appellate Court stated:

> No published premises-liability negligence case that we have found held both (1) that the open-and-obvious rule applied without exception and (2) that the defendant nonetheless owed the plaintiff a duty. The courts have provided no authority in plaintiff's favor. Tragic as the facts of this case are, they are not extraordinary in a legal sense and do not call for a result that would appear to be without precedent.

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