

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JENNIFER FAIR & KEVIN FAIR,)

Plaintiffs)

v.)

THE GOLDEN ANCHOR INC., d/b/a)

THE GOLDEN ANCHOR INN OF)

BAR HARBOR, MAINE,)

Defendant)

DOCKET NO. 95-0097-B

MEMORANDUM OF DECISION¹

This action arises out of an incident in which Plaintiff Jennifer Fair either dove or fell into Defendant's swimming pool and sustained permanent injuries. Plaintiff Kevin Fair is Jennifer's father, and seeks compensation for the costs of Jennifer's care.

Plaintiffs allege negligence on the part of Defendant. In view of Plaintiff Jennifer Fair's status as a trespasser, they set forth three separate theories upon which they believe Defendant may be held liable. First, Plaintiffs argue that there should be no distinction between trespassers and persons lawfully on the property for purposes of determining the standard of care Defendant owed to Jennifer. Second, Plaintiffs argue that, to the extent such a distinction exists, the Court should adopt an exception to the general rule regarding trespassers known as the "discovered trespasser" rule. Third, they assert that Defendant is nevertheless liable for the reason that its conduct violated the standard of care applicable to trespassers.

¹Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

Defendant filed its Motion for Summary Judgment on April 11, 1996, and Plaintiffs filed a timely response on April 29, 1996. Both parties have submitted Statements of Material Fact pursuant to Local Rule 19(b)(1).

DISCUSSION

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “A material fact is one which has the ‘potential to affect the outcome of the suit under applicable law.’” *FDIC v. Anchor Properties*, 13 F. 3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

FINDINGS OF FACT

The Golden Anchor Inn is an 88-unit inn located in Bar Harbor, Maine. There is a swimming pool on the property of the Golden Anchor Inn which is available for private guest use only and which is not visible from a public road. In 1994, the pool and its surrounding area were lit by a 250-watt lucalux bulb, located on top of a surveillance camera. The pool was surrounded by a split-rail fence with three entrances.

On the afternoon of July 29, 1994, the swimming pool at the Golden Anchor Inn began to leak, and the maintenance supervisor decided to allow the pool to leak down overnight to the point of the leak. The swimming pool area was closed at approximately 8:00 p.m. by placing

chains across the pool entrances. No blockades or warnings, other than ordinary pool closing apparatus, were placed at or around the swimming pool.

Plaintiff Jennifer Fair left The Thirsty Whale, a nearby bar, at approximately 11:30 p.m. that evening with a companion, Daniel Vashon. They planned to swim in the ocean, and in the course of finding their way to an appropriate place to do so, took a shortcut through the pool area at the Golden Anchor Inn. Plaintiffs concede that Jennifer and Daniel were both trespassers on the property of the Golden Anchor Inn on July 29, 1994. The parties dispute whether her actions were intentional, but it is undisputed that Jennifer entered the Golden Anchor Inn swimming pool in such a way that she sustained a compression fracture causing paraplegia.

LEGAL ANALYSIS

In this State, “[a] trespasser . . . is deemed to enter at his own risk, and ‘must take the premises as they are in fact, and he assumes all risk of injury from their condition.’” *Bonney v. Canadian Nat’l Ry.*, 800 F.2d 274, 277 (1st Cir. 1986) (quoting *Dixon v. Swift*, 56 A.2d 761, 763 (Me. 1903)). Accordingly, under Maine law, “a landowner is not required to use due care to maintain its premises reasonably safe for the benefit of trespassers.” *Id.*; *Lewis v. Mains*, 104 A.2d 432 (Me. 1954). A landowner’s duty toward a trespasser is “simply to refrain from wanton, willful or reckless acts.” *Bonney*, 800 F.2d at 276 (citing *Robitaille v. Maine Cent. R.R.*, 147 Me. 269, 270, 86 A.2d 386, 387 (1952)).

Plaintiffs assert that certain exceptions to this rule should be adopted; in particular, they maintain that the State of Maine should abolish the distinction between trespassers and licensees or invitees, or alternatively adopt a “discovered trespasser” exception. However, it has long been the steadfast rule in Maine that a trespasser is distinct from a licensee or invitee and a different

standard of care applies. It is not the prerogative of a federal court sitting in diversity to adopt exceptions to applicable state law, and this court is “absolutely bound by a current interpretation of that law formulated by the state’s highest tribunal.” *Daigle v. Maine Medical Ctr., Inc.*, 14 F.3d 684, 688 (1st Cir. 1994).

The sole remaining issue on this Motion for Summary Judgment is whether Defendant’s conduct constituted “wanton, willful or reckless acts” under Maine law. Plaintiff’s burden on this issue is a difficult one. “[T]he simple failure to make [a] premises safe for trespassers does not rise to the level of wanton misconduct forbidden under Maine Law.” *Bonney*, 800 F.2d at 276. Accordingly, there was no liability where an injured child was determined to be a trespasser at defendant’s sawmill operation, although the child lived upon the same property. *Lewis v. Mains*, 104 A.2d 432 (Me. 1954). There was no wanton conduct where the decedent fell into defendant’s unguarded elevator well. *Nelson v. Burnham & Morrill Co.*, 95 A. 1029 (Me. 1915). In another case, a defendant’s negligence in leaving a tank open into which plaintiff’s decedent fell into did not constitute a wanton act sufficient to find liability. *Dixon v. Swift*, 56 A. 761 (Me. 1903). In view of these precedents, the Court is satisfied that Defendant’s conduct with respect to the swimming pool was not wanton, willful or reckless. Accordingly, summary judgment is appropriately granted to Defendant on Counts One through Three of Plaintiff’s Complaint. Further, the Court agrees that Plaintiffs’ success on Counts Four and Five are dependent upon their success on the negligence claims, and that summary judgment is appropriate on these counts as well.

Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment is hereby GRANTED in its entirety.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on June 28, 1996.