PA205: Introduction to Legal Analysis and Writing

Ochampaugh v. Seattle

In this wrongful death action, the appellant seeks damages of approximately $ 2,000,000 allegedly sustained as a result of the drowning of his two sons in a pond situated upon the respondents' Skagit River Transmission Line Corridor, which extends 85 miles from power generating dams near Newhalem to the Seattle suburbs. The tragedy occurred in the summer of 1973. On December 9, 1974, a claim was filed by the appellant with the respondent City of Seattle. The claim was denied, but the City, responding to a petition by persons residing near the pond, and after securing the necessary approval of governmental agencies, filled the pond at a cost of about $ 23,000. On June 2, 1976, this action was instituted.

All of the available evidence pertaining to the accident and the nature of the pond and its environs was submitted to the court by affidavits and depositions, upon which the court, finding that there was no genuine issue of material fact and no basis for recovery, granted the respondents' motion for summary judgment.

These affidavits and depositions show that the pond, which was more or less oval in shape, was about 100 feet wide at its widest point and was shallow at the edges, reaching a depth of around 6 feet at its deepest point. Its origin was unknown, but it was thought that it had formed as the result of an excavation made before the City had acquired the corridor more than 50 years earlier. It was situated in an unimproved brushy terrain a few hundred yards from the housing development in which the appellant and his housekeeper and children resided and was accessible by way of the corridor's patrol road. Local residents who were familiar with it and the sheriff's deputies who found the bodies of the victims described it as an ordinary pond, having the same characteristics as other ponds located in the area, of which there were many. Its edges were boggy and there was an abrupt drop-off on one side. Its bottom was muddy and covered with debris, the water itself was muddy, and logs and other debris and one or two rafts floated on the surface. According to the undisputed evidence, however, these were not unusual features.

The pond was a favorite recreation spot for children living in the housing development, and one witness, who had been 12 years old at the time of the drownings, had been to the pond as many as 50 times, catching frogs and playing in the shallow water. His mother stated in her deposition that she did not consider the pond particularly hazardous and had no objection to her son's playing there, but that she did not permit her 4-year-old daughter to go that far away from home.

One resident, a deputy sheriff, stated that he did not consider the pond any more dangerous than a creek nearby or Lake Stevens, which was approximately the same distance away. No complaint had ever been made to the respondents about the pond, and its personnel in charge of property management were unaware of its existence, since it did not appear on any survey map which had been made since 1920, and they had not personally visited the area.

The Ochampaugh boys, who were 6 and 8 years of age, had been introduced to the pond by their father, the appellant, who took them there three times to fish. They did not know how to swim. The appellant had admonished them not to go to the pond by themselves. Returning home from work at around 6:30 p.m. on June 19, the appellant said, he found the boys missing and began to search for them. Their bodies were found late that evening in the pond. The death certificates fixed the time of

death at about 8 p.m. There were no witnesses to the drownings. One body was found in 4 to 5 feet of water about 15 feet from the west bank, halfway across the pond. The other was found about 25 feet from the shore. One of the deputy sheriffs who found the bodies formed the opinion that the boys had floated out on something, like a raft, and had fallen off. The other was unwilling to venture an opinion as to how they had come to be so far from shore.

One of the members of the search and rescue team who found the bodies said he had never seen warning signs or fences surrounding any pond in Snohomish County. His was the only testimony upon this subject.

Error is assigned to the Superior Court's conclusion that the pond did not constitute an "attractive nuisance." It is conceded that the rule in this jurisdiction is that a natural body of water, or an artificial body of water having natural characteristics, is not in and of itself an attractive nuisance.

The general rule is that a landowner owes no duty to a trespasser, except to refrain from causing willful or wanton injury to him. Mail v. M.R. Smith Lumber & Shingle Co., 47 Wn.2d 447, 287 P.2d 877 (1955). However, as we said in that case, concern for the welfare and safety of children has led to the development of the attractive nuisance doctrine. The elements which must be present for that doctrine to apply in a given case are set out in the leading case of Schock v. Ringling Bros. & Barnum & Bailey Combined Shows, 5 Wn.2d 599, 105 P.2d 838 (1940), and since restated in Mathis v. Swanson , 68 Wn.2d 424, 413 P.2d 662 (1966), Holland v. Niemi, 55 Wn.2d 85, 345 P.2d 1106 (1959), and McDermott v. Kaczmarek, 2 Wn. App. 643, 469 P.2d 191 (1970):

(1) The instrumentality or condition must be dangerous in itself, that is, must be an agency which is likely to, or probably will, result in injury to those attracted by, and coming in contact with it; (2) it must be attractive and alluring, or enticing, to young children; (3) the children must have been incapable, by reason of their youth, of comprehending the danger involved; (4) the instrumentality or condition must have been left unguarded and exposed at a place where children of tender years are accustomed to resort, or where it is reasonably to be expected that they will resort, for play or amusement, or for the gratification of youthful curiosity; and (5) it must have been reasonably practicable and feasible either to prevent access to the instrumentality or condition, or else to render it innocuous, without obstructing any reasonable purpose or use for which it was intended.

Would the court apply the attractive nuisance doctrine given the following changes in fact:

1) The pond was 300 feet wide rather than 100?

2) The pond was 25 feet deep rather than 6 feet deep at its deepest part?

3) The pond was surrounded by a concrete walkway built by the city?

4) The water was clear, rather than muddy?

5) The plaintiff’s sons were 3 and 4 rather than 6 and 8?