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### Tort Liability for Drowning: Wrongful Death, Personal Injury, Defenses

THURSDAY, NOVEMBER 14, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

David M. Bennett, Shareholder, Pretzel & Stouffer, Chicago

Douglas J. McCarron, Attorney, The Haggard Law Firm, Coral Gables, Fla.

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# WINNING CASE STRATEGIES IN PREMISES LIABILITY





## "Handling Aquatic Personal Injury & Wrongful Death Cases"

### Presented by: Douglas McCarron



D. Lucas E. Brown D. Beninati S. Estien C. Bland L. Canavan J. Canavan



L.R. Oldham L. Hinton L. Peterson V.G. Baker J. Kaiser Montero R. Camargo

# In California, Arizona and Florida, Drowning Was The Leading Cause

of accidental death in and around the home for children under the age of 5 years.



### POOL GATES AND BARRIERS/FENCES AT COMMERCIAL POOLS

# PATH TO VICTORY

- STATE LAW
- CODES
- INDUSTRY STANDARDS
- COMPARATIVE NEGLIGENCE
- COMPLAINING WITNESSES (NOTICE)

### BARRIERS

A successful pool barrier **PREVENTS** a child from getting **Over, Under Or Through** and keeps the child from gaining access to the pool except when supervising adults are present.

## BARRIERS The top of a pool barrier should be at least **48"above Grade,** measured on the side of the barrier which faces away from the swimming pool.

### GATES

Swimming pool barriers should be equipped with a gate or gates which restricts access to the pool.

**A Locking Device** should be include in the gate design.



## **RESIDENTIAL HOME POOLS**

# 75% **OF THE CHILDREN** involved in swimming pool submersion or drowning accidents were between 1 and 3 years old.

## **69% OF THE CHILDREN** who became victims in submersion incidents were not expected to be in or at the pool, but were found drowned or submerged in the water.

# **69% OF THE INCIDENTS** occurred in a pool owned by the victim's immediate family, and 33% **OF THE INCIDENTS** occurred in pools owned by relatives or friends.

### The best way to **Reduce Child Drownings** *in residential pools* was for pool owners to construct and maintain barriers that would preventing children from gaining access to pools.

However, there is no substitute for diligent supervision.









### ALARMS

Passage through any doors in the house wall should be controlled by security measures.

All doors which give access to a swimming pool should be equipped with an audible alarm which **Sounds Immediately** when the door and / or screen are opened.





Note: in all cases the barrier must be placed around the perimeter of the pool as per 424.2.17.1.12 and as per definition of: "Pool Perimeter" A pool perimeter is defined by the limits of the pool deck and any dwelling or non-dwelling wall or any combination thereof which completely surrounds the pool.



Note: in all cases the barrier must be placed around the perimeter of the pool as per 424.2.17.1.12 and as per definition of: "Pool Perimeter" A pool perimeter is defined by the limits of the pool deck and any dwelling or non-dwelling wall or any combination thereof which completely surrounds the pool.

### PALM BEACH COUNTY CODE Property maintenance code

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#### ARTICLES. - PROPERTY MARITEMANCE DODE

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ENTRIES I. - ADMINISTRATION

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14-1(c), "Existing structures and premises that do not comply with these provisions **shall be altered or repaired to provide a minimum level of health and safety as required herein."** The Code then references Swimming pool barriers specifically in Section 14-32(d)(2), "Outdoor swimming pools shall be provided with a barrier complying with the requirements set forth in the Florida Building Code, Sections 424.2.17.1.1 through 424.2.17.1.14.

## **SWAY / WAYPOINT HOMES**

### MANAGEMENT AGREEMENT

- 13.3. All gates shall close and latch easily.
- 13.4. If a swimming pool exists on the property, all of the fence gates shall be self-closing and latching and must swing away from pool.
- 13.5. Chain link fence may remain if appropriate for the property and neighborhood.
  - 13.5.1. Consult RCM for potential installation of privacy slats in chain link fence if;
    - 13.5.1.1. If rent income is \$2,000.00 or more per month, or;
    - 13.5.1.2. The environment of the neighborhood encourages the privacy slats.

### LEASE: POOL ADDENDUM

7. Periodic Inspections. Owner reserves the right to conduct periodic exterior inspections which include the pool and surrounding area. Residents whose swimming pool maintenance is not consistent with the guidelines set forth in this Addendum may be in default of the Lease if maintenance is not remediated as set forth in the Lease.

Resident agrees to the above terms and conditions and acknowledges that the following pool safety features are in place:

- All perimeter fencing surrounding the yard and pool area is at least five feet high. (Note: This can be the good neighbor fence surrounding the property provided it is continuous, connects to the home and has no gaps or voids that would allow passage by a sphere four (4) inches in diameter).
- All gates accessing the backyard or pool area are at least five feet high, open away from the swimming pool, and are self-closing with a self-latching device.
- Exit Alarms are installed on all exterior doors and windows with a sill height of 48 inches or less that provide direct access to the swimming pool.
  - The suction outlet(s) at the bottom of the pool are covered with anti-entrapment grates.
  - A pool safety notice is installed outside in a conspicuous location near the pool area.

### FALSE REPRESENTATION

K



## **BODIES OF WATER**

#### 40C-42.025 - DESIGN AND PERFORMANCE CRITERIA FOR STORMWATER MANAGEMENT SYSTEMS

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

CHAPTER 40C-42, F.A.C.

ENVIRONMENTAL RESOURCE PERMITS: REGULATION OF STORMWATER MANAGEMENT SYSTEMS

> Revised May 27, 2012



(a) Normally dry basins designed to impound more than two feet of water or permanently wet basins shall be fenced or otherwise restricted from public access, or shall contain side slopes that are no steeper than 4:1 (horizontal:vertical) out to depth of two feet below the control elevation...

#### SLIGER & ASSOCIATES, INC. - SURVEY RESULTS



#### SLIGER & ASSOCIATES, INC. - SURVEY RESULTS
















### THE INCIDENT – MAY 30, 2010



Ruben Camargo Daniel Sabelli Osvaldo Llanes

# The Palms

# Simple Case

# Pool is not allowed to be open at night!

#### ELECTRICAL

- 1. All electrical work shall be in accord with and shall conform to the NATIONAL ELECTRICAL CODE.
- 2. Light bodies and motor frames shall be grounded to the main electrical panel,
- 3. Reinforcing steel in the pool shall be grounded with minimum #8 insulated copper wire.
- 4. Bonding shall be according to NEC 680-22.
- 5. Underwater lighting shall be low voltage (max. 15 volts) with transformer and low-water cut-off capability.

These plans DO NOT provide for pool deck lighting for night swimming. Plans for night swimming, if desired, MUST provide for a minimum of 10 foot candles of illumination at the deck and pool surface and it is the owners responsibility to provide these plans to the COUNTY HEALTH DEPARTMENT showing all lighting calculations. These plans must be sealed by a professional engineer registered in the state of Florida.

 Overhead service wring shart not pass written an area extending a distance of 10 feet norizontally away from the inside edge of the pool walls, diving structures, observation stands, towers or platforms.

 The owner or General Contractor shall be responsible for providing written evidence from the electrical contractor or the electrical inspector of compliance with the NATIONAL ELECTRICAL CODE along with their certificate of construction on the application for a Swimming Pool Operating Permit Forms.

 It is STRONGLY RECOMMENDED THAT ALL EXTENSION CORDS USED IN AND AROUND THE POOL AREA BE EQUIPPED WITH U.L. APPROVED GROUND FAULT INTERRUPTER.

10 Provide a minimum of 30 foot candles of illumination at floor level in pool equipment room.

#### **BOARD OF DIRECTORS MEETING MINUTES 5/4/10**



It was discussed that at the next meeting the board would vote to change the rules concerning the pool. It was agreed that 12 years old is too young to be at the pool without supervision and that 10 PM is too late to have the pool open.

There is a peoblem with children pulling the fire alasm and thirt is a Pederill offense. A notice from the fire department and one firm the Association was malled to every unit and was also put on file doors.

### THE PALMS OF PEMBROKE – POOL RULES

#### THE PALMS OF PEMBROKE – POOL RULES

		POOL RULES	
The Dalms	1.	NO LIFEGUARD ON DUTY, SWIM AT YOUR OWN RISK.	
One Puins	2.	Pool hours are 9 a.m. to 10 p.m.	
The Palms of Pembroke	3.	No radios, tape decks or DC's are allowed without earphones.	
5	4.	No diapers in the pool. Children not toilet trained must wear approved water proof pants over diapers. Disposable diapers are not allowed. Swim diapers only.	
A Condominium	5.	No floating devices in pools. No rafts, beach balls, surf boards or similar beach equipment are permitted in poor or pool areas.	
	6.	No reserved seating areas.	,
2005	7.	Children under 12 may not swim or use the pool areas unless accompanied and supervised by an adult.	
	8.	Cover-ups and footwear are required in all common areas. A towel does not constitute a cover-up.	

# Pool hours are 9 a.m. to 10 p.m.

- 12. Running, horseplay, climbing, ball or Frisbee playing or other noisy activities are not permitted in or near pool areas. Parents are responsible for the behavior of their children.
- 13. Glassware is not permitted in or near the pools are, only non-breakable plastic containers (State Law).
- 14. Pets are not permitted in pool areas, even if carried.
- 15. Shower before entering the pools.

1

### AQUATIC SAFETY STANDARDS

#### FLORIDA ADMINISTRATIVE CODE 64E-9,

Night swimming – Pools shall not be open for swimming at night unless the requirements for lighting as specified in paragraph 64E-9.006(2)(c), F.A.C., are met. Night swimming shall be considered one half hour before sunset to one half hour after sunrise.

When night swimming is proposed, an engineer licensed in Florida shall provide certification that the deck and surface lighting requirements of paragraph 64E-9.006(2)(c), F.A.C., have been met.

(j) After satisfactory and timely correction of any deficiencies following the final construction inspection conducted by the department, the initial operating permit will be issued.

- Fla. Admin. Code 64E-9.005(1)(i)(3)



# THE PALMS IS IN VIOLATION OF THE CODE AND THE LAW

#### MY FOCUS IS ON HOW TO CUT COSTS!



#### SAFETY NOT A PRIORITY





# SUCTION ENTRAPMENT

#### **PETERSON OPINION - DECEMBER 2004**

Swimming pool pump was defectively designed at time pump was sold to owner of apartment complex at which pool was located, in that it did not contain readily available device which would automatically turn off pump and powerful suction effect after drain became clogged by foreign object, in this case, body of residential tenant's visitor after he removed unsecured protective gate and was caught in powerful suction of exposed drain, thus subjecting pump manufacturer to liability for visitor's catastrophic brain injuries. West's F.S.A. § 768. 1257.

#### HOW LONG HAS THE POOL INDUSTRY KNOWN OF THE DEADLY DANGERS OF SUCTION ENTRAPMENT?





#### **CPSC RESULTS 1970 - 1999**

**2 INCIDENTS** 



Total	147 cases	<b>36 deaths</b>
nin poor Datirtab	20 00000	. doutin
Whirlpool Bathtub	25 cases	1 death
Wading Pool	5 cases	1 death
Swimming Pool	51 cases	15 deaths
Hot tub/Spa/Jacuzzi	66 cases	19 deaths

### 2000 - 2009 SUCTION ENTRAPMENTS



Linnea - the 14th to die since Lorenzo Peterson due to suction entrapment

3 more died in 2009 after Linnea

#### Virginia Graeme Baker Pool and Spa Safety Act

October 14, 2008 Version

VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT\*

PUBLIC LAW 110-140

TITLE XIV-POOL AND SPA SAFETY

Sec. 1401. SHORT TITLE.

This title may be cited as the "Virginia Graeme Baker Pool and Spa Safety Act".

Sec. 1402. FINDINGS.

Congress finds the following:

(1) Of injury-related deaths, drowning is the second leading cause of death in en aged 1 to 14 in the United States.

In 2004, 761 children aged 14 and under died as a result of unintentional ing.

Adult supervision at all aquatic venues is a critical safety factor in preventing in from drowning.

Research studies show that the installation and proper use of barriers or g, as well as additional layers of protection, could substantially reduce the sr of childhood residential swimming pool drownings and near drownings.

403. DEFINITIONS.

title:

ASME/ANSL-- The term "ASME/ANSL" as applied to a safety standard means standard that is accredited by the American National Standards Institute and hed by the American Society of Mechanical Engineers.

Barrier.-- The term "barrier" includes a natural or constructed topographical e that prevents unpermitted access by children to a swimming pool, and, with t to a hot tub, a lockable cover.

Commission.-- The term "Commission" means the Consumer Product Safety ission.

Main drain.-- The term "main drain" means a submerged suction outlet Ily located at the bottom of a pool or spa to conduct water to a recirculating

Safety vacuum release system.-- The term "safety vacuum release system" a a vacuum release system capable of providing vacuum release at a suction caused by a high vacuum occurrence due to a suction outlet flow blockage.

Swimming pool; spa.-- The term "swimming pool" or "spa" means any outdoor

mofficial compilation was prepared by CPSC staff for the convenience of the reader. It includes the ments made by Section 238 of the Consumer Product Safety Improvement Act of 2008, Public Law 170-514, 122 Stat. 3016 (August 14, 2008). The compilation is not authoritative.



SPA SAFETY ACT.

# IntelliFlo® VS+SVRS

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# SCUBA DIVING AND SNORKELING



#### ADD HELIUM

# VIOLATED EVERY STANDARD IN THE INDUSTRY

- **BIVE INSTRUCTOR WITH CHECKERED PAST**
- MANIPULATED GAS LEVELS AND DECOMPRESSION PROFILES
- ABSOLUTELY RECKLESS TO CONDUCT THREE DIVES TO BEYOND 220 FEET WITH A NEW DIVER
- OUNNECESSARY DEADLY DIVE WAS TO RETRIEVE A \$40 PIECE OF EQUIPMENT



# CONCLUSION

# "Handling Aquatic Personal Injury & Wrongful Death Cases"





PROTECT YOUR PROPERTIES FROM POOL DANGERS

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By Rachel Z. Axoff Hinton. 'It couses Like most 2 year-olds, Loren Hinton owerd to play hidd and-seek. On a warm spring day in May 2000, Loren ran arcund with her finds at her family's apartment community, while her father manned the grill. Tragically, The little oil' wardened inthe

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to make sure that our facilities are working provident and the sure that our facilities are working provide and the sure that and the sure that are supported to the sure of the sure of

apartment owners'] deposition ( cross-examining them at trial, a

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# WINNING CASE STRATEGIES IN PREMISES LIABILITY



# Thank You

Douglas J. McCarron djm@haggardlawfirm.com

# Strategies To Defend Drowning Cases



David M. Bennett | Partner | <u>dbennett@pretzel-stouffer.com</u> Pretzel & Stouffer, Chtd. | One S. Wacker Dr.|Suite 2500 |Chicago, IL 60606 Tel: (312) 578-7716

www.pretzel-stouffer.com

Date: November 14, 2019

# Drowning Cases Involve Many Types of Pools which States Regulate:

- Residential pools
- Commercial pools
- Community pools
- Hotel, motel and resort pools and waterparks
- Apartment house pools
- Public or private school pools
- Gym pools
- Campground pools
- Homeowner association pools and lakes

# Causes of Action for Drowning/Swimming Accidents:

Negligence of Property Owner and Operator of a Pool

Duty, Breach and proximate cause

Caused By:

- Negligent supervision
- Understaffing
- Lack of Training
- Lifeguards: duty to provide, lack of training
- Prior Notice: knew or should have known
- Failure to Maintain Property, repair dangerous conditions
- Inadequate Signage/failure to warn of dangerous conditions
- Failure to Supply Safety Equipment
- Inadequate Fencing
- Vicarious liability of employer

# Causes of Action for Drowning/Swimming Accidents:

Premises Liability in Drowning Cases

Property owner's duty to keep property in a reasonably safe condition

#### Caused By:

- Failure to maintain property, repair dangerous conditions
- Prior notice of defective, dangerous condition
- Inadequate fencing surrounding the pool
- Unprotected swimming pool
- Ex, pool gate left open at a neighbor's backyard pool

# **Defenses to a Drowning Accident**

- Accident only
- Defendant met all industry standards, regulations: not negligent
- No Duty of Care
- No defective, dangerous condition
- No notice of defective, dangerous condition
- Assumption of the Risk
- Victim/parent/adult was partly responsible or at fault
- Victim Waived liability by signing Pre-Event Waiver
- Security videos support defenses
- Other cause of death, e.g. heart attack

# How to Defend:

- Starts with Risk Management
- Certifications
- Meeting state laws and regulations
- Written SOP
- Document Retention checklists, proof of safety in writing
- Training and on-going training
- Supervision
- Proper staffing
- No prior notice
- Thorough Investigation
- Attorney Meeting with Staff privileged and confidential reports from attorney
- Social Media investigation: search of witness's videos, photographs
- Experienced and credentialed Expert Witness

#### Swimming Pool/Waterparks/Slides/Beaches Regulations:

You Must Research and Learn Your State's Swimming Facilities Act that Applies to:

- Personnel:
  - Manager/Operator: a swimming facility manager.
  - Lifeguards: lifeguards shall be provided at all wave pools and water slides.
  - Lifeguards shall be provided at all pools.
- When persons under 16 are allowed without the supervision of a guardian 16 years of age or older.
- At facility where lifeguard is not provided, a SIGN shall be posted that states:

"This facility is not protected by lifeguards. Persons under the age of 16 must be accompanied by a parent, guardian or other responsible person at least 16 years of age. Swimming alone is not recommended."

# Your State's Swimming Facilities Act Applies to:

- Safety Equipment
- Notifications of drownings to Department within 24 hours
- Water Quality Testing
- Operation Reports and Routine Sampling
- Patron Regulations Rules displayed on placards

## Private Swimming Pool Enclosure Act

Requires all private residential property swimming pools to have:

- A protective fence, wall or other effective permanent barrier.
- To completely enclose the swimming pool.
- ▶ 42 inches or greater height.

## Signage

- State Pool Regulations require public pools to post numerous signs
- For example, maximum bather load.
- A "No Lifeguard" sign and that children under 16 may not swim without adult supervision.
- A sign with pool rules and regulations to be posted at the entrances and the dressing rooms.

# Why Signage?

- Signage is part of your culture of safety.
- Signage promotes a partnership with guests by providing them with critical warnings and instructions. Safety is a shared responsibility.
- Effective signage and good safety optics will insure guest compliance & reduce accidents.

## **Categories of Waterpark Signage**

- Required by State Regulation and the ADA
- General information "Safety is a shared Responsibility" "No food or beverages.
- Directions around park Arrows etc.
- Rules/Requirements Height, Weight, age
- Instructions- "how to" body position etc.
Standards and Regs

- ASTM F770 Operations
- ASTM F2376-08 Water Slides
- ANSI/IAF 9-2005 Aquatic Recreation Pools
- ASTM F-2291 Amusement Rides
- 2012 International Swimming Pool and Spa (ISPS)Code Section 611.

#### **Required Signs**

- Signs recommended or required by MFTR.
- Signs "NO DIVING" pools over 18" in depth
- Prolonged exposure to wave action may result in fatigue. Exercise caution in deep water" Post at entrance to wave pool.
- No Running
- No glass bottles or containers permitted
- Patron riding position instructions dispatch point

#### **ASTM F770-Operations**

- Owner use guidelines from manufacturer for special rider considerations. 4.2.1
- Signs shall be prominently placed, bold in design, with wording short, simple, and to the point. 4.3
- Signs to display operating instructions may include duties of riders including those listed in Section 5.

#### ASTM F770-11: Section 5- Patron Responsibility

- There are inherent risks in the participation in or on any amusement ride, device, or attraction. Patrons of an amusement ride, device or attraction, by participation, accept the risks inherent in such participation of which the ordinary prudent person is or should be aware. Patrons have a duty to exercise good judgment and act in a responsible manner while using the amusement ride, device, or attraction and to obey all oral or written warnings, or both, prior to or during participation, or both.
- Patrons have a duty to not participate in or on any amusement ride, device or attraction when under the influence of drugs or alcohol.
- Patrons have a duty to properly use all ride or device safety equipment provided.

#### Highlights 2012 ISPS Code

- Four Sign Classes- (1) General Information (2)Directional (3) Rules (4) Instructional.
- Sign material **durable**, **clean**, **smooth**.
- Same panel shape and size for each sign class.
- Pictograms always accompanied by text.
- Theme or artwork shall not invade message panel.
- Shallow water signs.
- Suction Entrapment per section 310

### "Safety Optics"

- Optics: What a facility/event looks like to the outside world; the viewing lens of public perception that can make or break your message.
- Safety Optics: The public's view of your safety priorities based on the most obvious signage in your facility and the placement and appearance of your safety messages.

## Safety Optics:

- A new way to look at your facility and evaluate your safety messages.
- All of your signs should support your basic message that safety is a high priority.
- The opposite of "CYA".

#### Poor Safety Optics - Examples:

- Signs too hard to read font too small
- Signs not bold or prominent
- Confusing references and undefined terms
- List of rules too long and wordy
- Signs placed out of direct view
- Warnings, instructions, requirements mixed together

#### The Swimming Facility Is On Trial

- Jurors primarily care about one thing:
  - Assigning blame
- Plaintiff's counsel wants to focus on the conduct of the facility
  - Safety/Danger Lens
  - Safety Rules and Contradiction
- We need your client's help with telling the "real" story
  - One that puts Plaintiff and/or alternative causation on trial

### **Big Picture Safety Questions:**

- Safety is the number one priority
- Safety is a top priority
- Danger is never appropriate
- Protection is always a top priority
- Reducing risk is always a top priority
- Sooner is always better
- More is always better

### Honesty and Truthfulness

- Plaintiff's counsel is looking to create inconsistency.
- The honest answer should always be some form of "it depends on the circumstances"
  - This will help keep you away from the "gotcha moment"
- The deposition is not the place to "win" the case, or tell the facility's story so that Plaintiff's counsel will realize he/she made a mistake and quickly dismiss the case thereafter.
- Save the facility's defense for a carefully crafted direct examination.

### Broad Safety Questions are Always Inherently Flawed

- Broad Safety Questions lack the proper specificity to allow for a specific answer.
- The honest answer to a vague/general question is a vague/general answer like:
  - "It depends on the circumstances"
  - "Not necessarily in every situation"
  - "Not always"
  - "Sometimes that is true, but not all the time"
  - "It can be in certain situations"

### THE BIG THREE ATTACKS:

- **Emotional Attack:** 
  - Plaintiff's counsel will act aggressive
  - Hoping to get return aggression (fight) or agreeing/pacifying (flight)
- Humiliation Attack:
  - Plaintiff's counsel will display shock, disbelief, or laughter
  - Hoping to get a defensive response "wait, wait ... let me explain ..."

#### Confusion Attack:

- Plaintiff's attorney will display confusion or lack of understanding
- Hoping to make you feel like your answer is not making sense, or that you are a poor communicator

#### How to Avoid the Attacks

- Impulsive spontaneous survival reaction = lose
- Slow down the pace, listen fully to the question, and identify the type of question or technique used by Plaintiff's counsel
- "Remain Calm" v. Recharacterize, be patient, remain disciplined
- Identify the emotional threat and calmly recharacterize it as a clever attempt to bait you into an argument

#### Guidance for Your Client's Next Examination

- Number one rule, be honest and truthful.
- Listen to the question and understand the question.
  - Do not guess, do not speculate.
- Know and appreciate the type of questions.
  - Fact questions get a short factual answer.
  - General conduct questions (hypotheticals) require a qualified answer.



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