

CINDY L. STEINBACK, individually and	:	IN THE COURT OF COMMON PLEAS OF
as Executrix of the Estate of Michael	:	LYCOMING COUNTY, PENNSYLVANIA
Copen, deceased,	:	JURY TRIAL DEMANDED
Plaintiff	:	
	:	
vs.	:	NO. 01-01,862
	:	CIVIL ACTION - LAW
TIMOTHY GEPHART and BECKY HILL,	:	
Defendants	:	MOTION FOR SUMMARY JUDGMENT

Date: August 8, 2003

MEMORANDUM OPINION and ORDER

Before the Court for determination is Defendants Timothy Gephart and Rebecca Hill's Motion for Summary Judgment filed June 16, 2003. The Motion for Summary Judgment requests that summary judgment be entered in favor of Defendants because Plaintiff has failed to establish a *prima facie* case of negligence.

Based upon the pleadings, the undisputed facts are as follows. On April 13, 2001, Michael Copen accompanied the Defendants to Susquehanna State Park. The Defendants had brought with them a boat they owned and intended to use that day upon the Susquehanna River. Upon reaching the river, the boat was removed from the trailer. At some point, Copen stepped into the boat. The boat became adrift and floated downriver. The boat began to take on water and sink. Copen was unable to make it back to shore and drowned.

Defendants argue they had no duty to protect Copen from harm. Defendants assert that one does not have a duty to prevent a person from hurting himself when that person places himself in peril. Defendants contend that Copen boarded and launched the boat by himself. Defendants also assert that once the boat was in the water they repeatedly called out to Copen for him to throw them a rope onboard and even tried to swim out to him.

In contrast, Plaintiff argues that Defendants did owe Copen a duty. Plaintiff asserts that the duty Defendants owed was to conduct the activity of boating in a safe and careful manner. Plaintiff argues that Defendants breached this duty by failing to ensure that the boat was seaworthy, failing to have adequate safety devices aboard, and failing to tie the boat to shore. Plaintiff contends that there are genuine issues of fact concerning Defendants' duty and alleged breach of that duty.

A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. In determining a motion for summary judgment, the court must examine the record “ ‘in the light most favorable to the non-moving party accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences.’” *Godlewski*, 597 A.2d at 107 (quoting *Hower v. Whitmak Assoc.*, 538 A.2d 524 (Pa. Super. 1988)). Summary judgment will only be entered in cases that “are free and clear from doubt” and any “doubt must be resolved against the moving party.” *Garcia v. Savage*, 586 A.2d 1375, 1377 (Pa. Super. 1991). Summary judgment may be properly granted “when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law.” *Rauch v. Mike-Mayer*, 783 A.2d 815, 821 (Pa. Super. 2001); *Godlewski v. Pars Mfg. Co.*, 597 A.2d 106, 107 (Pa. Super. 1991).

The party making the motion has the burden of proving that there are no genuine issues of material fact. *Rauch*, 783 A.2d at 821. The record from which this may be done includes the pleadings, depositions, answers to interrogatories, admissions, affidavits, and expert reports. Pa.R.C.P. 1035.1(1)-(3). The responding party cannot rest on the allegations or

denials contained in the pleadings, but must file a response that identifies issues of fact from evidence in the record or identify evidence in the record that establishes facts essential to the cause of action of defense. Pa. R.C.P. 1035.3(a)(1)-(2).

The Court will deny Defendants' motion for summary judgment. There are genuine issues of fact that prevent the Court from determining that as a matter of law the Defendants owed no duty to Copen. Defendants' Motion for Summary Judgment was submitted without affidavits, depositions or any specific reference to evidence of record to support the motion. This failure exists despite the assertion in the motion that extensive discovery had been undertaken. The evidence submitted by Plaintiff concerning the motion for summary judgment includes an expert report and an unsigned affidavit attached to her response to the motion for summary judgment. The Court has determined that it cannot consider the unsigned affidavit as evidence in deciding the motion. Defendants assert in their Brief in Support of Motion for Summary Judgment that the boat was equipped with a rope and that the drain plug was inserted at the time of the accident. In response, Plaintiff contends that no such rope was aboard, nor was any other safety equipment. Plaintiff also contends that the drain plug was not in place. Furthermore, it is unclear exactly how the boat got in the Susquehanna River. All that is clear is that the boat ended up floating down river with Copen in it.

Obviously, therefore, there is disagreement between the parties on material facts in the case *sub judice* that have an impact on the whether Defendants owed a duty to Copen and whether they breached that duty. The Court does not have evidence before it that clearly establishes essential disputed facts. The only evidence beside the pleadings properly presented

to the Court for determination on the summary judgment motion is Plaintiff's expert report of Captain Edward Gras, which apparently is not disputed by a contrary report.

Captain Gras summarizes facts he reports gleaned from various sources, including: the pleadings; the Pennsylvania Fish and Boat Commission records regarding this accident; records of the Williamsport Fire Department; records of the Lycoming County Department of Public Safety; videotaped interviews of Timothy Gephart and Rebecca Hill produced on the date of the accident by the Pennsylvania Fish and Boat Commission; Defendants' discovery responses; and the depositions of Timothy Gephart, Rebecca Hill, Officer Debra Wasilauski, Officer Lawrence Dvorshock, Officer Donald Barrett, Jr., Officer Joseph Ananea, and Ronald Jean. Captain Gras states, "The boat was removed from the trailer at the ramp as Ms. Hill backed the truck and trailer down the ramp. The boat was not tied off ... as it entered the water. Mr. Copen got into the boat and it drifted into the river when the cable attached to the trailer was released." Captain Gras continues later in the report, "It appears that the vessel sank when water entered the hull through the drain plug opening. There are indications that Mr. Gephart did not install and secure the drain plug prior to releasing the boat from the trailer. However, Mr. Gephart insists that he did secure the drain plug and that it dislodged when the boat struck the bridge." While this may be seen as some evidence of how the boat got in the water, it is not definitive proof.

The Court cannot take it upon itself to resolve the issues of fact. As such, it is appropriate to deny the motion for summary judgment since there are outstanding issues of fact on material issues in the case.

ORDER

It is hereby ORDERED that Defendants Timothy Gephart and Rebecca Hill's Motion for Summary Judgment filed June 16, 2003 is denied.

BY THE COURT,

William S. Kieser, Judge

cc: Michael J. Zicoello, Esquire
Richard G. Scheib, Esquire
Judges
Christian J. Kalas, Esquire, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)