

Perez v. Metropolitan District Commission (AC 40610)

Brief Summary: Wrongful death action following the decedent drowning while swimming in an undesignated area at Lake McDonough, owned by the defendant. The court held that summary judgment based on governmental immunity was proper because: (1) making changes to the policies is insufficient to demonstrate a ministerial duty; (2) an adverse influence due to defendant losing the manual containing the changes is insufficient in the absence of concrete evidence to create a genuine issue of material fact; and (3) the identifiable, victim imminent harm exception is inapplicable because no employee of the defendant observed the decedent or his group swimming.

The plaintiff, Vivian Perez, is the administratrix of the estate of Andres Burgos. On July 9, 2011, Burgos and a group of friends went to Lake McDonough, a recreational area owned and operated by the defendant, the Metropolitan District Commission. There are three beaches on the lake that the defendant permits the public to use. Each of these beaches is adjacent to a designated swimming area. The boundaries are indicated by a string of red and white buoys and posted signs. Further, the defendant's employees conduct random boat patrols to locate individuals swimming outside of designated areas. Burgos and his friends entered the water from an area known as the "the point" and swam to an island, called First Island, 250 feet from away shore. This was not a designated swimming area. During the return journey, Burgos slipped underwater. His friends alerted the defendant's lifeguards. Approximately fifty-five minutes after he was last seen, one lifeguard located Burgos lying faceup on a lakebed. He was transported to a hospital where he was pronounced dead due to asphyxia and drowning. The plaintiff filed a wrongful death action against the defendant. The complaint alleged that the defendant had a ministerial duty: (1) to prevent visitors from accessing and swimming in undesignated areas, (2)

to conduct timely boat patrols, (3) to initiate a timely search for Burgos, (4) to contact the police, or call 911, in a timely fashion, and (5) to possess and maintain appropriate rescue equipment, but had failed to perform one or more of these responsibilities, and this nonfeasance was a direct and proximate cause of Burgos' death. Alternatively, the plaintiff argued that Burgos was an identifiable person subject to imminent harm, thus, creating an exception to governmental immunity. The court granted the defendant's motion for summary judgment on the ground of governmental immunity. It concluded that the plaintiff failed to adduce evidence to raise a genuine issue of material fact as to the existence of a ministerial duty or that Burgos was an identifiable person subject to an imminent risk of harm.

The issues on appeal were whether there was a genuine issue of material fact with respect to (1) whether Burgos' death was caused by the defendant's breach of one or more of its ministerial duties; and (2) whether Burgos was an identifiable person subject to imminent harm.

The court held that there was no genuine issue of material fact regarding whether Burgos' death was caused by the defendant's breach of a ministerial duty nor whether Burgos was an identifiable person subject to imminent harm. Thus, affirming the judgment of the trial court.

Section 52-557n bars municipalities from liability for claims that involve the exercise of judgment or discretion. In contrast, they are not immune from liability for negligence arising out of their ministerial acts. Ministerial acts are acts to be performed in a prescribed manner without the exercise of judgment or discretion—usually identified by a statute or policy.

The plaintiff argued that there was a genuine issue of material fact as to whether Burgos' death was caused by the defendant breaching a ministerial duty. She relied on the deposition of Marcia Munoz, the individual responsible for safety at Lake McDonough at the time of the

incident. Munoz testified that she made “a lot of changes” to the defendant’s lifeguard policies prior to 2011, but she could not recall the specific changes without referencing a state manual from which the changes were derived. However, the defendant was unable to produce the state manual as it was lost. The plaintiff argued, without knowing the specific changes, that a reasonable jury could conclude that her changes created a ministerial duty or that her changes were not communicated effectively. She relied on *Strycharz v. Cady*, 323 Conn. 548, 148 A.3d 1011 (2016). The plaintiff in *Strycharz* was a high school student struck by a car while leaving school grounds. He alleged that the vice principals were liable in failing to execute their ministerial duty to assign school staff members to bus duty on the day of the incident. The court reversed summary judgment because an issue of fact remained as to whether they had distributed the roster that identified morning bus duty assignments to staff members. The court distinguished *Strycharz* because in *Strycharz* it was undisputed that a ministerial duty existed. However, in this case the plaintiff speculated that the changes Munoz enacted created ministerial duties. The court noted that a party may not rely on mere speculation to overcome a motion for summary judgment. Furthermore, the court noted that the exhibits submitted by the defendant clearly establish that the policies did not create ministerial duties with respect to preventing or rescuing an individual from drowning in an undesignated swimming area. Thus, concluding that Munoz’ inability to recall changes to the safety policies is insufficient to conclude that there is a genuine issue of material fact.

Alternatively, the plaintiff argued that she is entitled to an adverse inference that the defendant violated a ministerial duty because the defendant failed to preserve the state manual that Munoz used to amend the policies at Lake McDonough.

An adverse inference may be drawn against a party who has destroyed evidence if: (1) the spoliation was intentional; (2) the destroyed evidence is relevant to the issue or matter for which the party seeks the inference; and (3) the party who seeks the inference acted with due diligence with respect to the spoliated evidence. However, a party suffering from spoliation cannot build an underlying case on an inference alone for a claim to be actionable. The party must also possess some concrete evidence supporting the claim. Thus, a party cannot demonstrate a genuine issue of material fact based solely on an adverse inference.

Based on the above rule, the court rejected the plaintiff's argument as she failed to adduce any evidence to support the existence of a ministerial duty in conjunction with her claim for an adverse inference. Thus, holding that there was no genuine issue of material fact regarding whether Burgos' death was caused by the defendant's breach of a ministerial duty.

Next, the court addressed the plaintiff's argument that Burgos was an identifiable victim, subject to imminent harm. The identifiable person, imminent harm doctrine is an exception to discretionary immunity. It requires: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm.

The plaintiff relied on *Sestito v. Groton*, 178 Conn. 520, 528, 423 A.2d 165 (1979) to support her argument. In *Sestito*, a police officer witnessed an altercation between two men outside of a bar. Instead of intervening, the officer waited until one of the men was shot before he drove over and arrested the assailant. The Supreme Court of Connecticut held that there was a question of fact as to whether the defendant's police officer owed a legal duty to the decedent to prevent the shooting from occurring. However, the court distinguished *Sestito* because here there is no evidence that any of the defendant's employees saw Burgos, or any member of his group,

in the undesignated swimming area prior to the incident. Instead, the court stated that this case was analogous to *Evon v. Andrews*, 211 Conn. 501, 559 A.2d 1131 (1989), in which the Supreme Court of Connecticut concluded that the imminent harm exception did not apply to the plaintiffs' decedents who were killed in an apartment house fire. The exception did not apply in *Evon* because the court determined that the class of possible victims of an unspecified fire that may occur at anytime in the future is not a group of identifiable persons. Consequently, the court concluded that a group of individuals in an undesignated swimming area, whose presence is unknown to the defendant, cannot be deemed identifiable for the purposes of the exception. Accordingly, holding that there was no genuine issue of material fact as to whether the plaintiff's claim was barred by the doctrine of governmental immunity.

A takeaway from this case is that one cannot demonstrate a genuine issue of material fact to beat summary judgment based solely on an adverse inference due to spoliation of evidence. Further, it demonstrates that the identifiable person, imminent harm exception is very limited and will not apply unless one directly observes the person in a position of peril.