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# Recent Development: Blackburn Ltd. P'ship v. Paul: If a Trespasser is a Member of a Specific Class Protected by an Ordinance or Statute, Property Owners Owe a Duty of Care Despite Common Law Rule That No Such Duty is Owed

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## RECENT DEVELOPMENT

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***BLACKBURN LTD. P'SHIP V. PAUL: IF A TRESPASSER IS A MEMBER OF A SPECIFIC CLASS PROTECTED BY AN ORDINANCE OR STATUTE, PROPERTY OWNERS OWE A DUTY OF CARE DESPITE COMMON LAW RULE THAT NO SUCH DUTY IS OWED.***

**By: Ame P. Roberts**

The Court of Appeals of Maryland held that the Statute or Ordinance Rule might apply, regardless of the common law duty to trespassers. *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 112, 90 A.3d 464, 471 (2014) (citing *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 78, 835 A.2d 616, 620-21 (2003)). The court further concluded that Christopher Paul was a member of the class intended to be protected by statute, and suffered those injuries that the statute sought to prevent. *Id.* at 126, 90 A.3d at 479. Finally, the court held that a genuine issue of material fact existed and should have been submitted to the jury. *Id.* at 126-27, 90 A.3d at 480.

On June 13, 2010, three-year-old Christopher Paul went missing after playing outside with his brother. Christopher's mother ("Alicia") searched for him at the community pool and noticed his clothing inside the gate. When Alicia was unable to open the gate, a lifeguard came to assist her. She ran to the pool area and found Christopher submerged in the water. Christopher suffered a severe anoxic brain injury as a result of the near drowning, and requires continuous care for the duration of his life.

Alicia filed a complaint in the Circuit Court for Baltimore City on Christopher's behalf against Second Blackburn Limited Partnership, Berkshire Property Advisors, and Community Pool Services (collectively "Blackburn") alleging negligence and negligence per se. Alicia's negligence action claimed that Blackburn breached its duty to maintain the pool in a reasonably safe condition, particularly for children. The negligence per se count alleged Blackburn breached its statutory duty by failing to comply with the Code of Maryland Regulations ("COMAR") for Public Pools.

Blackburn filed a motion for summary judgment, arguing that, because of Christopher's status as a trespasser, it did not owe him any duty of care except to refrain from willful or wanton conduct. The circuit court granted the motion. Alicia appealed to the Court of Special Appeals of Maryland which reversed, holding that Blackburn breached its duty to Christopher by failing to maintain the pool as specified by COMAR. Additionally, the court of special appeals ruled summary judgment inappropriate because sufficient facts existed to establish causation. Blackburn appealed to the Court of Appeals of Maryland, which granted certiorari.

The Court of Appeals of Maryland began its analysis by conducting an overview of the common law duty owed to trespassers by property owners.

*Blackburn*, 438 Md. at 110, 90 A.3d at 470. Under the common law, property owners have the right to exclude others and only owe trespassers a duty not to willfully or wantonly injure them. *Id.* at 110-11, 90 A.3d at 470 (citing *Levine v. Miller*, 218 Md. 74, 79, 145 A.2d 418, 421 (1958)). In negligence cases, however, the court may apply the Statute or Ordinance Rule (“the Rule”) as an exception to the common law. *Blackburn*, 438 Md. at 110-11, 90 A.3d at 470 (citing *Brooks*, 378 Md. at 78, 835 A.2d at 620-21). To make out a prima facie case of negligence, the Rule requires a showing that the property owner violated a statute or ordinance created to protect a specific class of persons, to which the plaintiff belongs, and that the violation proximately caused the plaintiff’s injury. *Blackburn*, 438 Md. at 112, 90 A.3d at 471 (citing *Brooks*, 378 Md. at 79, 835 A.2d at 621). The Rule, when applicable, trumps the common law rule that property owners owe no higher duty to trespassers. *Blackburn*, 438 Md. at 115, 90 A.3d at 472.

With the Rule in mind, the court then considered COMAR to determine whether a statutory duty existed. *Blackburn*, 438 Md. at 117-18, 90 A.3d at 474. The stated purpose of the regulations is to protect and promote the safety and health of the public. *Id.* One of these sections, 10.17.01.21(A)(3), forbids an open space in the pool fence larger than four inches in diameter. *Id.* at 118-19, 90 A.3d at 475 (citing Md. Code Regs. § 10.17.01.21(A)(3) (2014)). However, COMAR also permits certain exemptions if the pool was built prior to the adoption of the regulations. *Blackburn*, 438 Md. at 119, 90 A.3d at 475 (citing § 10.17.01.03).

*Blackburn* argued for this exemption because its pool was built prior to the adoption of the regulations. *Blackburn*, 438 Md. at 119, 90 A.3d at 475 (citing § 10.17.01.03). However, the court rejected this claim. *Blackburn*, 438 Md. at 120, 90 A.3d at 476. While the statute does permit certain exemptions, the regulations also provide an exception to these exemptions. *Id.* One of these exceptions requires that any pool jeopardizing “the health and safety of the public” must correct the condition(s), regardless of when the pool was built. *Id.* at 119, 90 A.3d at 476 (citing § 10.17.01.03(D)(1)). The court reasoned that the fundamental danger of a pool is the water. *Blackburn*, 435 Md. at 120-21, 90 A.3d at 476-77. Thus, a fence that fails to prevent young children from accessing the pool unsupervised is a public risk that must be corrected. *Id.*

The court further supports its reasoning by discussing the Model Barrier Code’s (“MBC”) incorporation into COMAR. *Blackburn*, 438 Md. at 121-22, 90 A.3d at 477 (citing § 10.17.01.04(D)). The MBC’s stated purpose is to protect children, especially those less than five years of age, who are too young to comprehend the risks of drowning. *Blackburn*, 438 Md. at 123, 90 A.3d at 478. Allowing *Blackburn* an exemption would disregard COMAR’s purpose of protecting children. *Id.* Thus, *Blackburn* owed a statutory duty to Christopher. *Id.* at 120-21, 90 A.3d at 476-77.

Having determined that this statutory duty existed, the court moved to the application of the Rule. *Blackburn*, 438 Md. at 125, 90 A.3d at 478. Here,

Blackburn violated the statute, which was created to protect a class of persons to which Christopher belonged, satisfying the first prong of the Rule. *Blackburn*, 438 Md. at 124, 90 A.3d at 478-79.

The court then moved to the second prong, proximate cause. *Blackburn*, 438 Md. at 125, 90 A.3d at 479. Proximate cause is established when the harm suffered “is of a kind which the drafter intended the statute to prevent.” *Id.* (quoting *Brooks*, 378 Md. at 79, 835 A.2d at 261). The court held that a reasonable jury could have determined that the violation of the statute proximately caused Christopher’s injuries. *Blackburn*, 438 Md. at 127, 90 A.3d at 480. The facts stipulated that Christopher’s head was approximately 5.1 inches in diameter, there were no physical signs that Christopher struggled when entering the gate, the spacing between the vertical posts measured six inches, Christopher lived adjacent to the pool in question, and he was found submerged in the section of the pool closest to the gate. *Id.* at 126, 90 A.3d at 480. Thus, these circumstances created a genuine issue of material fact, and summary judgment was inappropriate. *Id.* at 126-27, 90 A.3d at 480.

In *Blackburn Ltd. P’ship v. Paul*, the Court of Appeals of Maryland acknowledged the dichotomy between the common law and statutory duty afforded to trespassers. The court looked to the Statute or Ordinance Rule to resolve this conflict, confirming that a statutory duty to a specific class of persons may trump common law. While this ruling grants protection to potentially vulnerable persons, it also requires both pool and property owners to exercise newfound caution with trespassers. However, the intersection of these conflicting duties is far from resolved. Maryland practitioners should expect to see uncertainties surrounding common law and statutory duty continue to arise in Maryland courts.