

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHAEL P. HOULIHAN, as Personal  
Representative of the Estate of DANIEL RYAN  
HOULIHAN,

UNPUBLISHED  
September 24, 1999

Plaintiff-Appellant,

v

No. 206093  
Oakland Circuit Court  
LC No. 95-507816 NO

JEFF ELLIS & ASSOCIATES, INC.,

Defendant-Appellee,

and

JOSH WELCH, DARCY FITCHKO, and ROBERT  
PHELPS,

Defendants.

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Before: Saad, P.J., and Murphy and O'Connell, JJ.

MURPHY, J. (dissenting).

I respectfully dissent.

I

Plaintiff alleged in his amended complaint that defendant Jeff Ellis & Associates, Inc., (defendant) was liable for the following negligent acts or omissions: failure to conduct lifeguard training in a reasonably safe manner; failure to draft and implement proper policies and protocols; and failure to conduct aquatic facility inventory in a reasonably safe manner. Plaintiff rests its contention that defendant owed a duty to perform the above acts in a reasonable manner on the following contract language: "The duties of the Contractor shall be . . . 1. Provide nationally recognized aquatic training program. Endorsed by the N.R.P.A." Although contract construction is ordinarily a question of law for the court, *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 418-419; 546 NW2d 648 (1996), where the language used is ambiguous, the substance of the parties' agreement is a question of fact for the jury. *Anderson v Brown*, 21 Mich App 699, 703-704; 176 NW2d 457 (1970). In my opinion,

the contract language at issue in this case is ambiguous, and therefore the trial court erred in removing from the jury's consideration the question whether defendant assumed and breached the duties proffered by plaintiff under the terms of the contract.

## II

Further, plaintiff's expert opined that Daniel Houlihan would have had to have been found within six to eight minutes from the time that he left his family to make a full recovery and eight to ten minutes to avoid death by drowning without a full recovery. Daniel's mother testified that three to seven minutes passed before she notified the lifeguards that Daniel was missing. Plaintiff also submitted evidence that the N.R.P.A. (National Recreation Parks Association) endorses the "three-minute rule" for locating a missing guest in the water. The three-minute rule was not employed in this case. The three-minute rule requires that lifeguards, who are guarding at a lakefront, must be able to locate a missing guest within three minutes of the first report that the guest is missing. A missing-person search conducted pursuant to the three-minute rule requires that lifeguards form a human chain across the water to search for a submerged guest. The head lifeguard at the park where Daniel drowned testified that a human-chain search would have started at the North end of the beach, and plaintiff's expert opined that because Daniel was found at the North end of the beach, a human-chain search would have resulted in Daniel being found within "moments" of notification that he was missing. Accordingly, given Daniel's mother's testimony that only three to seven minutes passed before she notified the lifeguards that Daniel was missing, Daniel would have been found, at the earliest, within three to six minutes after he had walked away from his family, or, at the latest, within seven to ten minutes after he left his family, either time-frame providing enough time for Daniel to have survived his ordeal. Therefore, because plaintiff presented evidence that it is more likely than not that Daniel Houlihan would not have died but for defendant's alleged negligence, I believe that plaintiff presented sufficient evidence of causation to establish a prima facie case of negligence. See *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

I would reverse.

/s/ William B. Murphy