

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA BARBARA  
DEPARTMENT NUMBER 3 HON. THOMAS P. ANDERLE, JUDGE

ODED GOTTESMAN, et al.,  
Plaintiffs,  
vs.  
CATHEDRAL OAKS TENNIS, SWIM &  
ATHLETIC CLUB, INC., et al.,  
Defendants.

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) SUPERIOR COURT  
) NO. 1246093  
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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Thursday, April 23, 2009

APPEARANCES:

For the Plaintiffs:

CAPPELLO & NOEL  
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**ORIGINAL**

1 SANTA BARBARA, CALIFORNIA; THURSDAY, APRIL 23, 2009

2 9:00 A.M.

3 DEPARTMENT NUMBER 3

HON. THOMAS P. ANDERLE, JUDGE

4  
5 THE COURT: Good morning.

6 TRIAL JURORS: Good morning.

7 THE COURT: All right.

8 All the ladies and gentlemen of the jury are in  
9 their assigned location, prompt as ever. All the lawyers  
10 are here, ready to go for their -- for Mr. Cappello's  
11 closing.

12 All right. Mr. Cappello, I know you're ready.  
13 Let's go ahead.

14 MR. CAPPELLO: Yes, your Honor. Thank you.

15 Ladies and gentlemen of the jury, I'd like to  
16 cover some of the points that were covered - this is my  
17 rebuttal close - so covered by the Defense.

18 First, by Mr. Henderson, that Cal-West was only  
19 financial oversight, this is false. The organization  
20 chart shows oversight manager. That's Exhibit 200. The  
21 minutes of the 9-19-05 minutes show "financial" was  
22 handwritten in the minutes after death. Mind you, the  
23 words "financial oversight" are never in the minutes at  
24 any time for the entire history of Cal-West or Cathedral  
25 Oaks until after Yoni Gottesman. The very next month is  
26 the first time anybody put the word "financial" in it.

27 Main drew an organization chart, Exhibit 203,  
28 which shows Cal-West is managing agent of all five clubs.

1           The next slide is one I showed you. That's the  
2 slide that shows the minutes of the meeting of  
3 September 19th, and the September 19th meeting, not one  
4 mention of Yoni Gottesman's death, and the tragedy of  
5 that death. The people in that meeting were concerned  
6 about one thing. Protecting Richard Berti, making sure  
7 he got out of Cal-West's -- any claim Cal-West might have  
8 in this case, and resigning from the clubs.

9           That did not even stop Mr. Berti from running  
10 the show, because minutes after minutes after minutes  
11 show he continued to run the meetings, continued to call  
12 the shots.

13           Next. Cal-West was only a financial oversight  
14 manager. Well, if you look at the website from 2002 and  
15 2005, it doesn't say "financial." It says "oversight."  
16 The argument was made, "Well, the copyright was dated in  
17 1998." But a copyright in 1998 doesn't do you any good  
18 if you claim you were out of the business in 1997.  
19 Remember? "I'm out of the business as oversight manager  
20 in '97." So a copyright in '98 is only proof of our  
21 case, that they continued in oversight management.

22           Richard Ortale's testimony that Cal-West did a  
23 variety of tasks. That's his testimony. I'm not going  
24 to read it to you, but it was clear to Mr. Ortale that he  
25 was paying three percent of the gross for all those  
26 tasks.

27           Next argument. Main was not an agent of  
28 Cal-West. This is false. If you look at the minutes of

1 their own corporate records done by Laura Lewis, the  
2 corporate secretary for Cal-West, Main is a  
3 vice-president. Vice-presidents are agents of a  
4 corporation. There she is. This is 2005.

5 Main testified she was employed as a Cal-West  
6 oversight manager as well as president of COAC. It is  
7 clear that Main was an agent of Cal-West, she was an  
8 officer of Cal-West, she was employed by Cal-West.

9 Next slide, please. This is Julie Main's  
10 testimony.

11 "Your position with Cal-West vis-a-vis each of  
12 these clubs was the same pretty much. And you were a  
13 manager?"

14 "Yes. Oversight manager."

15 Now, remember the first question. "Your  
16 position with Cal-West."

17 Last question. "Okay. Your role as oversight  
18 manager -- just so I'm clear, let me strike that.

19 "Which company hired you as oversight manager?"

20 "Answer. Cal-West."

21 Now, before you go to the next slide, one final  
22 argument. I do not care, I don't think the evidence  
23 matters, every one of you are intelligent people, whether  
24 it's oversight manager or financial oversight manager,  
25 give them their due.

26 Say it's financial oversight manager.  
27 Financial oversight is equipment, safety, regulations, to  
28 make sure you're licensed. He was in charge of that --

1 she was in charge of that.

2 Cal-West is an agent. Cal-West is the one that  
3 has caused us to spend the time here. Cal-West chose not  
4 to admit negligence. And that's why there's one reason,  
5 and one reason only, ladies and gentlemen, think.  
6 Mr. Berti and Mr. Ortale sold Cathedral Oaks. They  
7 cashed it out. They're gone out of Cathedral Oaks.  
8 There's new owners.

9 But he didn't sell Cal-West, so he doesn't want  
10 a judgment against Cal-West. That's why they have fought  
11 so hard on Cal-West.

12 Next argument. The Defense argued that there's  
13 no evidence that Mr. Merin was fired. Now, the whole  
14 Merin thing, you know, it's just simply to show that  
15 there's a lifeguard on duty who was inattentive. That's  
16 why it was there. And that people should have checked  
17 with the aquatics director over at Montecito Country  
18 Club. She said if somebody called, she would have told  
19 them.

20 Was he fired? Mr. Popovich said no evidence.  
21 Here's the evidence you heard.

22 "I had a conversation with Dave in which I  
23 informed him that we did not feel comfortable with him  
24 lifeguarding, and that he was going to be taken off the  
25 schedule, and was asked not to return."

26 Next.

27 By Justin Allen. "David Merin was terminated  
28 from the Montecito Country Club, because Miss Heyes and

1 you felt he was a risk; is that true?

2 "Answer. That's true. Yes. Terminated  
3 because he was a risk."

4 Mr. Popovich told you you didn't hear that  
5 testimony. This is the testimony.

6 "Mr. Allen, Mr. Merin's termination was  
7 effective with your knowledge, consent and approval,  
8 true?

9 "Answer. True."

10 Finally, John Reagan, "You were the person who  
11 said, Get rid of Mr. Merin?

12 "Yes, I did.

13 "And that was based on information you  
14 received?

15 "That's correct.

16 "Are you confident you made the right decision?

17 "Yes.

18 "And that's based on the information from  
19 Miss Heyes, isn't it?

20 "That's correct."

21 So to sit here and tell you based upon lawyer  
22 argument what you didn't hear, I'm showing you what you  
23 did hear.

24 This man should never have been at the  
25 Montecito -- at the Cathedral Oaks Club. And it's just  
26 one of a long list of terrible things.

27 Systemic failure admitted by Charlotte  
28 Valentine, testified to you by Mr. Harrell. This is what

1 happened at this club, they had prior drownings, prior  
2 knowledge, and this little boy was the ultimate victim.

3 Mr. Popovich argued that there was no evidence  
4 of training anywhere else, or training at Montecito  
5 Country Club, and McKenzie Heyes testified at great  
6 length about the training, pre- and post-service  
7 training, emergency action, et cetera.

8 "Would that qualify as pre-service training?

9 "Answer. Yes."

10 So his argument to you was incorrect.

11 There was an argument made that local pools,  
12 there was no evidence that local pools provided pre- or  
13 in-service training. That was a false argument. Because  
14 in this trial, their witness, Michael Oostman, testified  
15 under the cross-examination of my partner, Leila Noel,  
16 that in fact in Santa Barbara, they had other pools that  
17 had standard operating procedures. Other pools had  
18 emergency response plans. Other pools had in-service  
19 training. Other pools did drills for lifeguards. So  
20 Oostman himself confirmed that other local pools did.

21 And finally, with regards to the fact that  
22 there was no evidence about other local pools,  
23 Mr. Oostman confirmed that the YMCA, and Mr. Gottesman  
24 and Mrs. Gottesman confirmed, that the YMCA had higher  
25 standards. They learned that after their son died, but  
26 they realized when they were at the YMCA, the various  
27 things that they had to do and watch at the YMCA, and  
28 Mr. Oostman confirmed it.

1           You heard an argument that licensing was a red  
2 herring, and a joke. There is probably nothing more  
3 significant than the prior evidences of drowning than the  
4 fact that this club operated without a license. COAC  
5 violated the law, and was cited. They had three appeals  
6 that were all denied. There was unrebutted testimony  
7 from Dr. Harrell and Maria Valencia that licensing would  
8 have required napping facilities, in-service and  
9 on-the-job training in child care and supervision, all  
10 which would have made a difference.

11           "The requirements are for the safety of  
12 children," was told to you. The facility has to be  
13 constantly checked to ensure they are properly licensed.

14           You don't have to know to drive in the State of  
15 California that you can call the DMV and find out if  
16 you're exempt. That's, you know to drive.

17           If you run a child care facility, you know  
18 you've got to have a license. Otherwise you don't --  
19 you're not in the business.

20           If you run a restaurant, and you know you've  
21 got to be checked and licensed by public health, you  
22 can't have an excuse that, "I called for an exemption,  
23 and I spoke to some unknown person."

24           "What agency did you call?"

25           Miss Wasserman said, "The County."

26           Miss Steidl thought she called the State, but  
27 she wasn't sure. She didn't even remember the date. She  
28 was ten years off on the date.

1           The point is, calling and asking 10 or 12 or  
2 15 years before a death is not an excuse. You run a  
3 business, you make sure you're licensed. This is a  
4 business that required protection of children. What is  
5 more important?

6           And when faced with whether or not they  
7 ultimately had to do it, it was too expensive, so they  
8 said, "No, we're not going to do it," and I'm telling  
9 you, I think from what you've heard in this case that it  
10 was that that caused them to think about it back in the  
11 '90s, maybe if we can get an exemption, we can run this  
12 place without doing all the thing we've got to do. And  
13 of course, there was no such thing.

14           Now, before we turn to the next -- oh, you can  
15 put this up. That's okay.

16           Let me tell you, ladies and gentlemen of the  
17 jury, the argument that Yoni was dead in the pool, I told  
18 you yesterday that the Gottesmans are not asking for  
19 punitive damages. They're not. They're not entitled to  
20 punitive damages. They are only entitled to compensation  
21 for the loss.

22           Punitive damages, when you read the  
23 instruction, is for the harm caused to Yoni, because the  
24 law in its beauty -- it has its quirks, but it has its  
25 beauty.

26           It says, the parents, they don't get for pain  
27 and suffering and punitive damages, but even if somebody  
28 takes the life of another, that other has the right

1 through the law, through survivorship, through an estate,  
2 and I represent Yoni Gottesman's estate, to say to the  
3 people that took the life, "You caused the greatest harm  
4 of all. You've taken a life. There should be a penalty  
5 for that," and that's the case for punitive damages.  
6 It's not, "Oh, they get punitive damages." It's for the  
7 harm to Yoni.

8 MR. POPOVICH: Objection. That is a misstatement of  
9 the law.

10 MR. HENDERSON: Join.

11 THE COURT: Well, I'm going to sustain the  
12 objection, and ask you to move on.

13 MR. CAPPELLO: All right.

14 "Yoni was dead in the pool," they said. Well,  
15 the jury instruction, the last words on the jury  
16 instruction is, "A determination of death must be made in  
17 accordance with accepted medical standards." That's how  
18 the death is to be made, the determination, not an expert  
19 witness who takes the stand and looks at a video and  
20 says, "Based on my looking at the video, I say he's dead  
21 before they pull him out of the pool." That's not  
22 acceptable medical standards.

23 This is. The death certificate. That's done.  
24 Officially. That's the death certificate. That is a  
25 significant time after that child came out of the pool.  
26 Dr. Zapalac told you that drowning does not mean dead.  
27 Dr. Zapalac told you that.

28 "Can you tell the jury whether or not in this

1 case you undertook efforts to save Yoni Gottesman's life?

2 "I did.

3 "Why did you do that?

4 "Because there was a chance we could  
5 resuscitate him.

6 "Dr. Zapalac, do you believe that Yoni  
7 Gottesman was in irreversible cardiopulmonary arrest?

8 "I don't believe it was irreversible.

9 "Do you believe it was irreversible when he  
10 arrived in the emergency room?

11 "I do not."

12 This is the doctor that pronounces.

13 "Do you believe that Yoni Gottesman suffered  
14 irreversible brain function?

15 "I can't say it was irreversible brain damage.

16 "Dr. Zapalac, Yoni Gottesman has not suffered  
17 any irreversible loss until you pronounced him dead?

18 "I don't think it was irreversible until we had  
19 gone through resuscitation, and until I pronounced him.

20 "Is it true that you made the determination of  
21 death in accordance with medical standards?

22 "Yes."

23 Dr. Steinman said, "Eyes fixed and dilated is  
24 not evidence that they're dead." He answered the  
25 question, said, "No, Counselor, because people have been  
26 successfully resuscitated even though their eyes are  
27 fixed and dilated."

28 Dr. Steinman's report is totally consistent

1 with Dr. Reda. So says Dr. Reda. Why? Because  
2 Dr. Steinman says five minutes, and Dr. Reda says five  
3 minutes.

4 Remember, Dr. Reda took you and took you  
5 through the video, and he showed you that Yoni was moving  
6 up to two and a half to three minutes, struggling,  
7 sometimes putting his little head up, his hands out, and  
8 he said, "If you would have given proper CPR," of course  
9 they didn't, "that boy would have been resuscitated,  
10 based on my knowledge," and that is totally consistent  
11 with Dr. Steinman.

12 All right. Ladies and gentlemen of the jury,  
13 those are the facts as you saw them. I want to now turn,  
14 in the last ten minutes of my argument to what this case  
15 is about.

16 You saw a portion of video where the counselors  
17 walked out. Counsel told you that one was in front, one  
18 was behind. That's not true. Counselors were in the  
19 front, the little kids were behind. You can look at the  
20 film. Doesn't matter.

21 The point is, the counselors never got in the  
22 pool with the kids. For three minutes, all those kids  
23 were in the pool for three minutes without any  
24 counselors.

25 When you saw that video where Shipley walked  
26 Yoni and two other boys out for swim lessons, you saw the  
27 beauty of the little boy that this case is all about.  
28 Jumping, so excited, waving at Mr. Shipley, waving at

