RAYMOND POUST and GAYLE POUST, individually and as Co-Executors of the Estates of AARON DOUGLAS DANIEL POUST and ADAM WADE POUST, Deceased,	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	JURY TRIAL DEMANDED
vs.	:	NO. 01-01,863
RICHARD HEUSER and LEE ANNA HEUSER,	:	CIVIL ACTION
Defendants	:	MOTION FOR SUMMARY JUDGMENT

Date: September 5, 2003

OPINION IN SUPPORT OF AUGUST 18, 2003 ORDER

This Opinion is entered to explain and affirm this Court's prior order of August 18, 2003 granting Defendants Richard and Lee Anna Heuser's Motion for Summary Judgment and dismissing the Plaintiffs Raymond and Gayle Pousts' action with prejudice.

Facts/Procedural Background

The present case is a wrongful death/survival action arising from the deaths of Aaron Douglas Poust and Adam Wade Poust, ages six and three. Before the Court for determination is Defendants Richard and Lee Anna Heuser's (Heusers) Motion for Summary Judgment filed June 5, 2003. The motion seeks dismissal of Plaintiffs Raymond and Gayle Poust's (Pousts) claims because Heusers assert that they, as landlords out of possession, are not liable to trespassing children.

The case was initiated by a Praecipe for Writ of Summons filed November 14, 2001. A Complaint was filed March 14, 2002. The theory of liability asserted in the complaint was what is commonly known as the attractive nuisance doctrine.

The Court finds the following to be the undisputed, material facts. Pousts and Heusers own parcels of property that adjoin. On December 20, 2000, Aaron and Adam Poust were sledding down a hill located between the Poust and Heuser properties. The usual sled run started on the Poust property and ended on the Heuser property. This was not the first instance of children using the hill for sledding. The Pousts' older son, Curtis, had used the hill for sledding, as did the Heusers' children when they lived on the property.

Typically, when the hill was used for sledding, the path of travel and sled marks would be visible eight to ten feet away from the pond. However, on the day of the incident, the toboggan the Poust children were riding went down the hill and onto the ice covered pond located on the property owned by the Heusers. The ice could not support the toboggan and the children. Tragically, the children drowned after falling through the ice.

Aaron and Adam Poust were trespassers on the Heuser property. At no time did they have permission from either the Heusers or their tenants, Steven and Ashley Kuntz, to be on the property. The pond is a man-made, artificial condition of the property. There were no warnings signs or barriers to prevent children from accessing the area around the pond or the pond itself.

At the time of the incident, the Heusers were landlords out of possession. The Heusers had leased the property to Steven and Ashley Kuntz by a lease dated August 3, 1995. The lease stated that the leased property included the farmhouse plus lawns and the pond. At the time of the incident, the Kuntzes occupied the property.

As landlords, the Heusers made repairs and did maintenance on the property. During the prior tenancy of Randy and Alvin Brion, a contractor was hired by Heusers to dig

out mud from the pond and place it on the upper bank. Also during the Brion tenancy, a length of pipe was installed by Richard Heuser to bring spring water into the pond, which was initially ten feet, but was replaced with a longer length. During the Kuntz tenancy, a trench was dug to repair a septic problem on the property and the springhouse was rebuilt. During the subsequent Erich Rich tenancy, Richard Heuser had Dan Murray dig out the cat of nine tails in the pond and burned a ring around the pond to clear it.

Discussion

The issue before the Court is whether Heusers, as landlords out of possession, owed a duty to the two trespassing Poust children who drowned in their pond.

Pousts have based their theory of liability on the attractive nuisance doctrine. Pousts contend that Heusers knew or should have known that children were likely to trespass since the pond was in close proximity to the Pousts' home, a home with small children, and was located at the base of a hill ideal for sledding. Pousts assert that the pond involved an unreasonable risk of death or serious bodily injury to children that would not be readily apparent to children of Aaron and Adam's age because the constant flow of water from the springhouse would cause the ice on the pond to be weak. Pousts allege that Heusers acted unreasonably in failing to protect children from the danger posed by the pond by not erecting warning signs or a barrier to prevent children from sledding onto the pond.

Heusers argue, *inter alia*, that they are not liable under the attractive nuisance doctrine because the doctrine applies to possessors of land and that they, as landlords out of possession, are not possessors of land. Therefore, the resolution of the motion for summary

judgment turns on whether the attractive nuisance doctrine only applies to possessors of land and whether Heusers are possessors of land.

A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. 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 moving party has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. 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).

"The standard of care a possessor of land owes to one who enters upon the land depends upon whether the person entering is a trespassor (sic), licensee, or invitee." ***Carrender v. Fitterer***, 469 A.2d 120, 123 (Pa. 1983). Usually, the duty an owner or occupier of land owes to a trespasser is to refrain from willfully or wantonly injuring him. ***Oswald v. Hausman***, 548 A.2d 594, 598 (Pa. Super. 1988). However, there is an exception to this rule. A possessor of

land is subject to liability for physical injury caused to trespassing children by an artificial condition on the land if:

> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Jesko v. Turk, 219 A.2d 591, 592 (Pa. 1966) (quoting Restatement (Second) Torts § 339 (1965)). All five of the requirements must be met to hold a possessor of land liable. ***Ibid.***

This doctrine only applies to *possessors* of land. The language set forth in the Restatement (Second) Torts § 339 and adopted by this Commonwealth in ***Jesko***, *supra*, and later cases, ***Long v. Manz***, 682 A.2d 370 (Pa. Super. 1996), ***Norton v. Easton***, 378 A.2d 417 (Pa. Super 1977), clearly states "possessors." The use of the classification possessor is an attempt to delineate among different types of status as would pertain to property. For instance, a possessor is different from an owner. An individual can be one without being the other. The point is that the doctrine chose this particular language and its associated meaning for a reason. That reason was to keep the doctrine focused on advancing the doctrine's underlying purpose.

The doctrine articulated in §339 embodies the concept of limiting an owner's unrestricted use of his land in the interest of protecting children from serious bodily injury. ***Gallegher v. Frederick***, 77 A.2d 427, 429 (Pa. 1951). The doctrine imposes a duty to protect children from dangers that they do not appreciate. ***Long***, 682 A.2d at 375-76. In order to protect children and for the duty to apply, a possessor must know or should know that there is a dangerous condition on the property that children will not appreciate and that children are likely to trespass. Without such knowledge there is no liability under the doctrine. *See, e.g.*, ***Whigham v. Pyle***, 302 A.2d 498, 499 (Pa. Super. 1973) (lack of knowledge regarding trespassing children); ***Norton***, *supra*, (lack of knowledge regarding dangerous condition).

The doctrine applies the duty to a possessor of land because he will be in a better possession to protect children and keep them from being injured. This is because a possessor has or should have the requisite knowledge by his presence on the property. A possessor of land will more than likely know if and when children are entering the property. A possessor of land will more then likely know of a dangerous condition existing at the time the children enter the property. A possessor of land has a more active involvement with the property and would be more aware of events that were taking place on the property. This knowledge provides the possessor of land with the ability to act in order to protect children; therefore, liability will be imposed when the possessor fails to act on this knowledge.

Having concluded that the doctrine applies to possessors of land, the Court now comes to the crucial question of whether Heusers are possessors of land. Pousts acknowledge that Heusers are landlords out of possession, but argue that they retained possession over the property by continuing to do maintenance and repair work. *Plaintiffs' Brief in Opposition to*

Defendants' Motion for Summary Judgment, 3. The uncontradicted evidence is that during the Kuntz tenancy a trench was dug to repair a septic problem and that the springhouse was rebuilt. Even if the trench was dug out to the pond, as Pousts assert, but Heusers deny, the actions taken by Heusers would still be insufficient to establish that they were possessors of the property at the time of this tragic accident.

To be a possessor of land, one: (1) must be in occupation of the land with the intent to control it, (2) must have been in occupation of the land with the intent to control it if no other party has done so subsequently, or (3) must be entitled to immediate occupation if neither of the other alternatives apply. ***Blackman v. Federal Realty, Inv. Trust***, 664 A.2d 139, 142 (Pa. Super. 1994); Restatement (Second) Torts § 328E (1965). Normally, "[t]he question of whether a party is a 'possessor' of land is a determination to be made by the trier of fact." ***Ibid.*** However, a court can decide a question usually left for jury where reasonable minds could not differ as to the conclusion. *See,* ***Howell v. Clyde***, 620 A.2d 1107 (Pa. 1993).

The fact that Heusers performed maintenance and made repairs does not mean that they retained possession of the property. In ***Henze v. Texaco, Inc.***, a patron of a service station fell and was injured after tripping over a loose threshold in the station's office doorway. 508 A.2d 1200 (Pa. Super. 1986). The patron brought suit against the landlord of the service station under the theory that the landlord retained possession of the station. Texaco reserved in the lease the right to make the necessary repairs to the property if the lessee did not and charge them for it. Texaco had made repairs to the station during the tenancy, even installing a kick plate on door of the office where the accident occurred, and had an inspector visit the station twice per month. ***Id***. at 1201.

The Superior Court held that the landlord was not in possession of the leased premises. The Superior Court stated, "the mere fact that Texaco occasionally made repairs to the service station did not subject it to liability as a lessor in possession." ***Id***. at 1203. Also, the fact that Texaco reserved the right to make repairs in the lease and the fact that it chose to exercise that right did not establish a reservation of control over the leased premises. *See*, ***Id***. at 1202-03.

Similarly, the fact that Heusers made repairs and did maintenance on the property does not mean that they retained control over the property sufficient to conclude that they were possessors of the property. In a sense, Heusers did exercise control over the property in that they made decisions affecting it, but the control was not that which would be indicative of a possessor. What the Heusers did by digging the trench to repair the septic tank and rebuilding the springhouse is more characteristic of a landlord looking after his investment property, similar to the situation in ***Henze***, *supra*.

To be a possessor of land means that one has to exercise some dominion over the land. *See*, ***Moore v. Duran***, 687 A.2d 822, 827 (Pa. Super. 1996). The Heusers have not exercised dominion over the property. They have not reserved in the lease control over any portion of the leased property. Also, Heusers have not taken any affirmative action to exercise control over the property to the exclusion of others. The maintenance and repairs performed by Heusers is more akin to ownership, rather then possession. Therefore, the Court cannot conclude that Heusers are possessors of the leased property.

Conclusion

Heusers did not owe the deceased Poust children a duty under the attractive nuisance doctrine. The attractive nuisance doctrine imposes a duty on a possessor of land. Heusers are landlords out of possession and are not possessors of the leased premises. Therefore, the attractive nuisance doctrine does not apply to the Heusers, and they are not liable for the deaths of the Poust children.

BY THE COURT:

William S. Kieser, Judge

cc: Michael Zicolello, Esquire
Bret J. Southard, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)