JOHN D. BURFIELD, Executor	:	IN THE COURT OF COMMON PLEAS OF
ANGELA BURFIELD, Executor	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
	:	
vs.	:	NO. 02-01,056
	:	
H. DEWANE STUCK and	:	
JAMES L. STUCK,	:	
Defendants	:	MOTION FOR SUMMARY JUDGMENT

Date: July 23, 2004

OPINION and ORDER

Before the Court for determination is the Motion for Summary Judgment of Defendant H. Dewane Stuck filed May 10, 2004.[1] The Court will deny the motion. The stairs at issue in this case constitute a nuisance *per se,* and there is a genuine issue of fact that must be resolved before the applicability of the failure to make repairs after notice and a reasonable opportunity exception to the landlord out of possession doctrine can be determined. Therefore, summary judgment is inappropriate.

Plaintiffs John and Angela Burfield (hereafter Burfields) have brought wrongful death and survival actions against Defendant H. Dewane Stuck (hereafter "Stuck") arising out of the death of their son, Wyatt Benjamin Burfield. On August 24, 2001, John Burfield dropped off four-year-old Wyatt at 328 Woodland Avenue, Williamsport, Pennsylvania. That was the residence of John and Susan Sanso. The Sansos were the aunt and uncle of Wyatt.

[1] Defendant James Stuck had joined in the present Motion for Summary Judgment. Subsequently, he filed a Second Motion for Summary Judgment on June 28, 2004 seeking summary judgment on the basis that he did not own the property in question, at no time was he involved in the care custody and control of the property, and was not involved with the lease between the Sansos and H. Dewane Stuck. The Plaintiffs concurred in the Motion. An Order was entered on July 19, 2004 granting the Motion and dismissing James Stuck from the case.

John Burfield took Wyatt to the Sansos' for them to baby-sit Wyatt while he went to look at a house and Angela Burfield was at work.

The 328 Woodland Avenue residence has a front porch. The porch is elevated a few feet above the concrete sidewalk. There are five steps that ascend from the sidewalk to the porch. On August 24, 2001, there was no handrail or guard along the side of the steps away from the residence. This left the steps open on that side. Approximately two years before August 24, 2001, John Sanso constructed a gate across the top step because of concerns he had about his young children playing out there. The gate was free swinging and could swing out and over the stairs.

Around 12:00 p.m. on August 21, 2001, Wyatt was playing outside on the porch with his cousins Colten (then three years old) and Adam (then fourteen years old). Wyatt stood on the gate and it swung out over the steps. Wyatt then fell. While there is contention between Burfields and Stuck as to whether Wyatt fell onto the stairs first or directly onto the concrete, in either case, Wyatt sustained serious injuries from the fall. Wyatt died later that day at the Williamsport Hospital.

The Sanso residence was part of a double home located on Woodland Avenue. Stuck was the owner of the double home at the time of the incident and had lived in the 330 Woodland Avenue part of the structure for three years, moving out in 1978. However, she did not reside there at the time of the incident. Sansos had rented the 328 Woodland Avenue residence from Stucks pursuant to an oral lease. Sansos began renting the residence from Stucks in 1998. At the time the lease was entered into, there was no handrail/guard along the stairs or gate installed at the top of the steps.

The thrust of Burfields' negligence claim focuses on the lack of a handrail/guard and the gate. First, Burfields contend that Stuck was negligent for failing to have installed a handrail/guard with spindles along the open side of the stairs. Second, Burfields contend that Stuck was negligent for failing to install a gate across the top of the stairs when the porch was located 30 inches above the ground below and the stairs hand no handrail. As part of this, Burfields further allege that Stuck was negligent in failing to ensure that the gate, which was constructed and installed by John Sanso, was structurally sound.

Stuck argues that she is entitled to summary judgment because the landlord out of possession doctrine precludes liability against her for Wyatt's death. Stuck asserts that she did not retain possession over the stairs or gate area. Stuck also argues that the absence of a gate or rail was an obvious condition that existed at the time the lease was entered into. Stuck contends that she had no duty to maintain or make repairs to the stairs and gate area, and the fact that she contracted for the annual cleaning of the chimney, furnace, gutters and down spouts does not establish possession. Stuck argues that Sansos were the possessors of the stairs and gate area and that they are responsible for the injuries caused by the property in their possession.

In response, Burfields argue that Stuck is not entitled to summary judgment. Initially, Burfields argue that the landlord out of possession doctrine does not shield Stuck from liability. Burfields contend that Stuck retained possession of the defective premises in two ways. One is that after the incident, Stuck entered upon the property and installed a rail along the steps, which would have been a trespass if she had no right to be there. The second is that Stuck had retained authority to make repairs to and due maintenance at the property and did

exercise that authority. Burfields argue that the staircase constitutes a nuisance *per se* because Stucks violated the BOCA National Property Maintenance Code, the BOCA National Building Code of 1999, and City of Williamsport ordinances by failing to have installed a handrail/guard along the stairs. Burfields also argue that Stuck failed to make repairs in the form of installing a handrail/guard after she had constructive notice of the dangerous and defective condition. Burfields contend that Stuck had lived at the property previously and would have been aware of the lack of handrail/guard. Burfields also contend that staircase abuts the front sidewalk and is visible from the street so that its condition would be apparent to a passerby.

Burfields further argue that there are genuine issues of fact that preclude entry of summary judgment. They assert that there is a genuine issue of fact regarding Stuck's alleged negligence in failing to properly install a handrail/guard on the staircase because experts differ on the effect said railing would have had on the nature of Wyatt's fall and subsequent death. Burfields contend that there is a genuine issue of fact regarding whether Wyatt fell straight down to the concrete or struck the stairs first. Burfields assert that resolution of this issue would have an impact upon the role the lack of a side rail with spindles would have had in causing Wyatt's death. They assert that there is a genuine issue of fact regarding whether Stuck retained possession of the property, as there is a dispute as to who was responsible for repairs and maintenance of the premises. Burfields also contend that there is a genuine issue of fact regarding whether the alleged negligence of Stuck or the alleged negligence of Sansos caused the death of Wyatt.

Burfields further argue that causation is a jury question and that they should be given an opportunity to present evidence, disputed as it may be, to the jury and let the jury draw its own inferences and conclusions regarding negligence and causation.

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 movant 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).

Initially, the Court must address Burfields contention that there are genuine issues of fact that preclude the entry of summary judgment. With the exception of the issue concerning who was responsible for repairs and maintenance, the factual questions raised by Burfields are not germane to the issue presented in this Motion. The issue in this Motion concerns the applicability of the landlord out of possession doctrine. That is a duty issue that

must be resolved before any questions regarding causation are to be reached. Therefore, any issue of fact must relate to the applicability of the landlord out of possession doctrine.

In Pennsylvania, the general rule is that a landlord out of possession is not responsible for injuries suffered by third parties on the leased premises. ***Dinio v. Goshoun***, 270 A.2d 203, 206 (Pa. 1969); ***Dorsey v. Continental Assoc.***, 591 A.2d 716, 718 (Pa. Super. 1991), *app. denied*, 612 A.2d 985 (Pa. 1992); ***Kobylinski v. Hipps***, 519 A.2d 488, 491 (Pa. Super. 1986). However, there are six exceptions to the general rule whereby the landlord could be subject to liability. They are: (1) if the lessor has reserved control over a defective portion of the demised premises; (2) if the demised premises are so dangerously constructed that the premises are a nuisance *per se*; (3) if the lessor has knowledge of a dangerous condition existing on the demised premises at the time of transferring possession and fails to disclose the condition to the leasee; (4) if the lessor leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the leasee; (5) if the lessor undertakes to repair the demised premises and negligently makes the repairs; (6) if the lessor fails to make repairs after having been given notice of and a reasonable opportunity to remedy a dangerous condition existing on the leased premises. ***Dorsey***, 591 A.2d at 716; ***Henze v. Texaco, Inc.***, 508 A.2d 1200, 1202 (Pa. Super. 1986).

Burfields contend that Stuck is liable for the death of Wyatt. They contend that three of the exceptions to the general rule apply. Specifically, the exceptions: reserved control, nuisance *per se* and failure to make repairs after notice and reasonable opportunity. The Court will address each of those exceptions in turn.

Reserved Control Exception

The first exception Burfields contend applies is that Stuck reserved control over the stairs and top step area because she retained the authority to make repairs and conduct maintenance on the premises and did in fact exercise that authority. A landlord out of possession may incur liability if he has reserved control over a defective portion of the demised premises. ***Dorsey***, 591 A.2d at 716; ***Henze***, 508 A.2d at 1202. However, occupation and control are not reserved to the owner by his agreement to repair. ***Keiper v. Marquart***, 159 A.2d 33, 35 (Pa. Super. 1960). This rule was made clear in ***Henze v. Texaco, Inc.***, *supra*.

In ***Henze***, the plaintiff brought suit to recover for injuries she sustained after tripping over a loose threshold in the doorway of a service station's office. 508 A.2d at 1201. The property had been leased to Texaco, Inc. Texaco then sublet it to an individual who would operate the service station. The lease had a provision requiring the sublease to maintain the service station " 'in good repair and in good, clean, safe and healthful condition.'" ***Ibid.*** The lease also provided that if the sub-lessee failed to make the necessary repairs then Texaco could make them and charge the sub-lessee for the repairs. Although the sub-lessee generally notified Texaco about the necessity for major repairs, Texaco would also send a representative twice a month to inspect the service station. During the tenancy, Texaco and the subleasee made repairs to the service station. As would relate to the threshold and doorway area, Texaco had previously installed a kickplate on the office door. On two or three occasions, the subleasee had noticed that the threshold had become loose and repaired it by tightening the screws. One of the issues in the case was whether Texaco had retained control over the station because it had made repairs to the service station from time to time. ***Id***. at 1202.

The Superior Court held that Texaco had not. It stated that "… the mere fact that Texaco occasionally made repairs to the service station did not subject it to liability as a lessor in possession." ***Henze***, 508 A.2d at 1203. This was because:

> '[r]eservation by a lessor of the right to enter upon the leased premises for various purposes and to make repairs and alterations, if he should elect to do so, implies no reservation of control over the premises which will render him chargeable with their maintenance and repair. Moreover, the fact that the landlord makes repairs does not impose [on him either a duty] to keep the demised premises in repair, or liability for damages for injuries caused by a failure to keep the premises in repair.'

Id. at 1202-03. (quoting 49 Am.Jur.2d *Landlord and Tenant* §775 (1970)). Texaco did not retain control over the service station. The right to enter and make repairs did not establish a reservation of control; nor did the fact that Texaco actually entered upon the premises and made repairs to the service station.

The same is true in this case. Stuck did not retain control over the stairs and top step area by retaining the right to make repairs and do maintenance on the property or by actually making repairs to the property. It is disputed between the parties as to who would be responsible for making repairs and doing maintenance under the lease. But on the reservation of control issue, the resolution of this dispute is unnecessary. Even if it is determined that Stuck had agreed to make all repairs to the property, under ***Henze***, the right to make repairs does not establish a reservation of control. That is equally true if Stuck actually made repairs or did maintenance to the property. From 1998 through 2001, Stuck had the furnace and chimney of the property inspected and had the gutters and downspouts cleaned yearly. Deposition of H. Dewane Stuck, 12 (February 18, 2004). This is akin to Texaco making repairs to the service station in ***Henze***, and there it was determined not to be a reservation of control.

Regarding the specific area at issue, Stuck installed a handrail on the steps subsequent to the incident. This too does not establish a reservation of control. This is similar to Texaco installing a kickplate on the office doorway. In ***Henze*** and here, the landlord had made a repair and exercised some form of authority over the area of the property at issue. In both cases, that does not establish a reservation of control sufficient to impose liability on a landlord out of possession.

The ***Henze*** case makes it clear that the reservation of the right to repair and due maintenance does not establish a reservation of control. The ***Henze*** case also makes it clear that actually exercising that right does not establish a reservation of control, even if the repair is done in the area that is the subject of the suit. As such, Stuck did not reserve control over the stairs and the top step area.

Nuisance Per Se Exception

The second exception that Burfields argue applies is the nuisance *per se* exception. A landlord out of possession is subject to liability for an injury on the leased premises if the demised premises are so dangerously constructed that the premises are a nuisance *per se*. ***Dorsey***, 591 A.2d at 716; ***Henze***, 508 A.2d at 1202. Burfields argue that a set of stairs, which do not have a handrail/guard on the open side or a guard at the top of the steps that rises to a front porch approximately three feet above the ground constitutes a nuisance *per se*. Burfields contend that such a condition posses a risk to the safety and welfare of anyone who uses the stairs because without such barriers there is a danger that a person could fall and suffer a serious bodily injury. Burfields assert that this danger was recognized and an attempt to remedy it was made in §PM-702.9 of the BOCA National Property Maintenance Code of

1996[2] and §1005.5 of the BOCA National Building Code of 1999,[3] which would require the owner of the property to have a handrail/guard installed along the stairs. Burfields have averred that the City of Williamsport has enacted both sections through ordinances and that Stuck was in violation of these ordinances at the time of the incident.

A set of stairs, which do not have a handrail/guard on the open side or a guard at the top of the steps, that rises to a front porch approximately three feet above the ground is a nuisance *per se*. A violation of an ordinance is not conclusive of a nuisance or a nuisance *per se*. *See*, ***Dressell Assocs. v. Beaver Builders Supply, Inc.***, 778 A.2d 800, 802 (Pa. Cmwlth. 2000). "A nuisance *per se* is a nuisance at all times and under any circumstances…. A nuisance in fact, on the other hand, is one which becomes such by reason of its location, surrounding circumstances, and the manner in which the acts complained of are done." 1 P.L.E. Nuisance §1. "A nuisance *per se*, as relating to private persons, is an act or use of property of a continuing nature offensive to and *legally* injurious to health and property or both…." ***Erie v. Gulf Oil Corp.***, 150 A.2d 351, 353 (Pa. 1959) (emphasis in original).

In light of the tragic injury suffered by Wyatt, it would seem easy to conclude that a set of stairs like these would be a nuisance *per se*. The visceral reaction would be to say

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[2] "Every exterior and interior flight of stairs having more then four (4) risers shall have a handrail on at least one side of the stair, and every open portion of a stair, landing, balcony, porch, deck, ramp or other walking surface, which is more then 30" (762 mm) above the floor or grade below shall have guards. Handrails shall not be less then 30" (762 mm) nor more then 42" (1067 mm) high, measured vertically above the nosing of the tread or above the finished floor of the landing or walking surfaces. Guards shall not be less then 30" (762) high above the floor of the landing, balcony, porch, deck, ramp or other walking surface." BOCA National Property Maintenance Code of 1996 § PM-702.9.

[3] "Guards shall be located along the open-sided walking surfaces, mezzanines, stairways, ramps and landings, which are located more then 15.5" (394 mm) above the floor or grade below. The guards shall be constructed in accordance with Section 1021.0." BOCA National Building Code of 1999 §1005.5.

that any condition that could result in someone's death is dangerous under all circumstances and should not be allowed to continue unabated. However, the standard for declaring a condition to be a nuisance *per se* is a high standard. The following three cases give some guidance on what characteristics are required to meet the nuisance per se standard.

In ***Whaley v. Citizen's National Bank***, a bank had installed a brass rail hooked up to an electric battery for the purpose of preventing people from leaning against the bank window. 28 Pa. Super. 531, 533-34 (1905). A number of people received serious injuries from coming in contact with the rail, including the plaintiff in the case who was rendered unconscious and lost the use of his left arm. ***Id***. at 534. To no one's shock, the Superior Court held that a device which was capable of inflicting serious bodily injury to persons on a public street was a nuisance per se. ***Id***. at 538.

In ***Brown v. White***, the owner of two adjoining buildings channeled the drainage of water from the two buildings onto an archway between the two buildings where it would then flow down to the pavement and into the street. 202 Pa. 297, 306-07 (1902). The owner had installed a drainpipe that would carry sink contents from a second story apartment to the archway and a drainpipe from the other building's roof to the archway. The water flowing from the archway had formed a sheet of ice across the sidewalk on which the plaintiff slipped and fell. ***Id***. at 307. The Supreme Court held that the drainage system was a nuisance per se. ***Id***. at 311.

In ***Richey v. Armour***, the plaintiff had slipped and fallen on ice that had formed on stairs as a result of snow and ice melting off of eaves that hung over the steps. 293 Pa. 127, 128 (Pa. 1928). The Plaintiff relied upon ***Brown***, *supra*, to support her argument that the eaves

constituted a nuisance per se because their location allowed water to drip onto the steps and form ice. The Supreme Court distinguished ***Brown*** on the basis that the danger posed by the eaves was a transitory condition that would likely only exist in the winter. ***Id***. at 130. Unlike the situation in ***Richey***, the Supreme Court noted that the drainage pipe in ***Brown*** created a regular flow of water that resulted in a continuous ridge of ice. ***Ibid***. Ultimately, the Supreme Court held that eaves overhanging steps did not constitute a nuisance per se. ***Ibid.***

From these cases, it is clear that a nuisance per se exists if the condition imposes a risk of serious injury to a person and that risk must be ever present. The stairs at issue in this case have those characteristics. The unguarded stairs do pose a risk of serious bodily injury to every individual who may use them or be near the top of them because of the danger of a fall due to the lack of an adequate rail or guard. This risk of serious bodily injury is ever-present since there is no handrail and/or guard along the steps.

The stairs rise to a height of approximately three feet. Granted, this is not an inherently perilous height, but a fall from that height could still result in a serious bodily injury.

The drafters of the BOCA Code provisions and Williamsport property maintenance ordinances recognized this. While their violation is not a conclusive determination of a nuisance *per se*, the Code provisions and ordinances provide evidence of the danger posed by stairs of this nature. The handrail and/or guard requirement of the Code provisions and ordinances was established out of the desire to eliminate the danger of a serious bodily injury caused by a fall from steps like the ones in this case. The ordinances are a clear public policy statement recognizing the seriousness of the danger posed by stairs of this height warranting the installation of a handrail and/or guard along the stairs. The danger posed by

stairs of this height, which did not have a handrail and/or guard, was apparent and a remedy was implemented

The danger posed by the stairs in the alleged condition is also apparent to the Court. As such, the stairs in this case impose an ever-present risk of serious bodily injury. Therefore, the stairs are a nuisance *per se* and the nuisance *per se* exception applies in this case.

Failure to Make Repairs After Notice and a Reasonable Opportunity Exception

A landlord may incur liability for an injury sustained on the leased property if the lessor fails to make repairs after having been given notice of and a reasonable opportunity to remedy a dangerous condition existing on the leased premises. ***Dorsey***, 591 A.2d at 716; ***Henze***, 508 A.2d at 1202. The applicability of this exception cannot be determined as there are two issues of fact that must be decided by a jury. There is a genuine issue of fact concerning whether and to what extent Stuck had agreed to make repairs to the leased premises. There is a genuine issue of fact as to whether Stuck would have had notice of the condition of the stairs.

On the agreement to repair issue, it is the Burfields' position that Stuck agreed to make repairs to the property as she had final authority over what repairs would be made to the property. It is Stuck's position that pursuant to the oral lease it was the lessee's responsibility to maintain and supervise the property. On the notice issue, Burfields argue that Stuck would have had actual or constructive notice of the defective and hazardous condition of the steps and porch. Burfields assert that Stuck had resided at the property in the other half of the double home and would have been aware of the condition of the steps. Burfields also assert that the stairs abut the front sidewalk of the property and are within five feet of the street. Burfields contend that the view of the stairs from the street is unobstructed and would be

visible if one passed by the property. As such, there are genuine issues of fact that must be resolved before the applicability of this exception can be determined.

Accordingly, Stuck's Motion for Summary Judgment is denied.

O R D E R

It is hereby ORDERED that Motion for Summary Judgment of Defendants' H. Dewane Stuck and James L. Stuck filed May 10, 2004 is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Daniel K. Mathers, Esquire
David R. Bahl, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)