

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JUSTINE WATTS, Personal Representative
of the Estate of JAVON J. DAVIS, Deceased
AND On Behalf of the Estate of JAVON J.
DAVIS,

Plaintiff

v.

DAVID ABERNATHY and SHIRLEY
ABERNATHY,

Defendants

v.

MELISSA SNYDER and DEMONTE
DAVIS,

Additional Defendants

No. 05-01,201
CIVIL ACTION

JUSTINE WATTS, Personal Representative
of the Estate of NYKEEMA D. SNYDER,
Deceased AND On Behalf of the Estate of
NYKEEMA D. SNYDER,

Plaintiff

v.

DAVID ABERNATHY and SHIRLEY
ABERNATHY,

Defendants

v.

MELISSA SNYDER, ALEXANDER
McCLENTON, and DEMONTE DAVIS,

Additional Defendants

No. 05-01,202
CIVIL ACTION

SUMMARY JUDGMENT

OPINION AND ORDER

Before this Honorable Court, is the Defendants David and Shirley Abernathy's (hereinafter "Defendants Abernathy") July 21, 2006 Renewed and Supplemental Motion for Summary Judgment. In their Motion, Defendants Abernathy contend that the Plaintiff has failed to allege a genuine issue of any material fact as to a necessary element of her cause of action. For the following reasons, the Court agrees with Defendant Abernathy and, accordingly, GRANTS their Motion for Summary Judgment.

I. Background

In mid-morning hours of August 7, 2004, Defendant David Abernathy discovered the lifeless bodies of Javon Davis and Nykeema Snyder in his swimming pool. The swimming pool is located in the back yard of Defendant Abernathy's newly purchased home. Following an investigation into the minor childrens' deaths, the childrens' mother, Defendant Melissa Snyder, and Javon's father, Demonte Davis, were charged and ultimately pleaded guilty to endangering the welfare of children in connection with the drowning deaths of Javon and Nykeema.

In July 2005, prior to Defendants Snyder and Davis's sentencing, the Plaintiff, the children's maternal grandmother, filed the instant action. The Plaintiff contends that Defendant Abernathys' negligence was the direct and proximate cause of Nykeema and Javon's death. The Plaintiff specifically cites five negligent act she claims Defendant Abernathys are guilty of: failing to enclose their pool by a fence, gate, or other device; failure to have a fence around their property; failure to comply with the City of Williamsport Zoning Ordinance 1341.24(c) which requires all properties that have a pool to be completely enclosed by a fence or other device; and

failure to secure their property to prevent accidents such as the death of the Plaintiff's grandchildren from occurring.

On December 19, 2005, Defendants Abernathy filed their initial Motion for Summary Judgment; the Court, on February 7, 2006, reserved ruling on said Motion until all discovery was complete. After the July 21, 2006 discovery deadline, Defendants Abernathy filed their Renewed and Supplemental Motion for Summary Judgment on July 21, 2006. On August 17, 2006, the Court, after reviewing the briefs filed by Plaintiff and Defendants Abernathy and hearing argument reviewed local newscasts videos of the scene provided by Defendant Abernathy. Although Plaintiff requested that the Court view the fence gate surrounding the pool (now in storage with the Williamsport Police Department), the Court does not believe viewing the gate out of context will assist in its decision.

II. Discussion

Summary judgment is appropriate, after the close of the relevant pleadings, "where there is no genuine issue of material fact that is a necessary element of the cause of action, or if an adverse party, who will bear the burden of proof at trial, has failed to produce evidence of facts essential to the cause of action." Pa.R.C.P. No. 1035.2. In reviewing the motion for summary judgment, the Court must review the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Fine v. Checcio*, 582 Pa. 253, 264, 870 A.2d 850, 857 (Pa. 2005) citing *Jones v. SEPTA*, 565 Pa. 211, 772 A.2d 435 (Pa. 2001). Finally, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt. *Fine*, at 264, 857 citing *Marks v. Tasman*, 527 Pa. 132, 589 A.2d 205 (Pa. 1991).

In a basic negligence action, the plaintiff must establish that the defendant owed the plaintiff a duty, which the defendant breached, and that said breach was the cause of the plaintiff's injuries. Here, the Plaintiff claims that Defendants Abernathy had a duty to ensure that Javon and Nykeema did not enter the pool in their backyard. The Plaintiff goes onto accuse Defendants Abernathy of failing to perform this duty (i.e. erect and maintain a fence around said pool in accordance with local ordinances) was the cause of the childrens' death.

In response, Defendants Abernathy contend that they did erect and maintain a fence, in accordance with local ordinances, around their pool and, that the Plaintiff has failed to establish the necessary elements of her cause of action as set forth in the Restatement (2nd) of Torts § 339. The Restatement (2nd) of Torts § 339 states that, before a possessor of land can be held liable for the injuries of child trespassers sustained as a result of an artificial condition on said land, the plaintiff must prove all of the following five elements:

1. the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass;
2. 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;
3. 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;
4. 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

5. the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Goll v. Muscara, 211 Pa. Super. 93, 96, 235 A.2d 443, 445 (Pa. Super. Ct. 1967)¹.

Here, Defendants Abernathy had no reason to know that children were likely to trespass in their backyard. The Plaintiff claims that numerous neighbors bore witness to Javon and Nykeema roaming the neighborhood, unsupervised, on numerous occasions; however, Javon and Nykeema had only moved in across the street from Defendants Abernathy the day before their death. The neighborhood the Plaintiff claims that the children were seen roaming, unsupervised, was several blocks away in a different neighborhood. Moreover, Comment g to the Restatement (2nd) of Torts § 339 reminds us that “[i]t is not enough that the possessor “should know” of trespasses (citation omitted) in the sense that a reasonable man in his position would investigate to discover the fact. The possessor is under no duty to make any investigation or inquiry as to whether children are trespassing, or are likely to trespass, until he is notified, or otherwise receives information, which would lead a reasonable man to that conclusion.”

The Plaintiff also contends that because Defendants Abernathys home was in a residential area, they should have anticipated that children would trespass on their property and likely be drawn to the pool in their backyard. Although this contention is accurate, Defendants Abernathy abated this problem by maintaining, in accordance with local ordinances, a fence and gate enclosing their swimming pool; the Plaintiff has not provided sufficiently reliable evidence to the contrary.

¹ In *Muscara*, the Superior Court of Pennsylvania affirmed the trial courts granting of the defendant’s judgment notwithstanding the verdict in the plaintiff’s action for damages resulting from injuries her son sustained while trespassing on the defendant’s under-construction property.

It is clear to the Court that the Plaintiff has failed to meet the first of five necessary elements of their cause of action; accordingly, the Court need not address whether the Plaintiff has met the remaining four elements of their cause of action.

ORDER

AND NOW, this _____ day of September, 2006, the Court hereby GRANTS Defendant Abernathy's Motion for Summary Judgment. Accordingly, the Plaintiff's Complaint, as to Defendants David and Shirley Abernathy, is DISMISSED.

By the Court,

Nancy L. Butts, Judge

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 Judges
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