IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DAVID AND BARBARA KALB, as Parents and Next Friends of BRIANNA KALB, a minor	)	
Plaintiffs,	)	C.A. No. N12C-02-172 EMD
v.	)	
RONALD AND EDITH COUNCIL and JONATHAN AND AMY BURNETT,	)	TRIAL BY JURY OF TWELVE DEMANDED
Defendants.	)	

Submitted: March 19, 2013
Decided: May 8, 2013

Upon Defendants' Motions for Summary Judgment
DENIED

Timothy E. Lengkeek, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, *Attorney for Plaintiffs*.

Mary E. Sherlock, Esquire, Weber Gallagher Simpson Stapleton Fires & Newby LLP, Wilmington, Delaware, *Attorney for Defendants Ronald and Edith Council*.

David L. Baumberger, Esquire, Law Offices of Chrissinger & Baumberger, Wilmington, Delaware, *Attorney for Defendants Jonathan and Amy Burnett*.

DAVIS, J.

INTRODUCTION

This is a personal injury action brought by Plaintiffs David and Barbara Kalb as parents and next friends of Brianna Kalb. The Kalbs allege that the negligence of Defendants Ronald and Edith Council and Jonathan and Amy Burnett (collectively,

"Defendants") resulted in injuries Brianna Kalb sustained when she was kicked by a horse that was owned by the Burnetts and kept on property owned by the Councils. Defendants have moved for summary judgment on the basis that neither the Burnetts nor the Councils owed Brianna a duty against injury by one of the Burnetts' horses. For the reasons set forth below, the Defendants' Motions for Summary Judgment are **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

The Burnetts and the Councils reside on neighboring tracts of land in Smyrna, Delaware. Mr. Burnett and Mr. Council agreed by handshake, approximately seven to eight years ago, that the Burnetts could use a two acre pasture located on the Councils' land for their horses. In exchange, the Burnetts maintain the pasture's grass and the fence enclosing the pasture.[1] At the date of the cause of action, the Burnetts had five horses that accessed the pasture from a paddock on the Burnetts' land through a fenced shoot or alley that crosses land owned by Larry and Phyllis Simpkin.

On February 17, 2011, Brianna was visiting the Councils' granddaughter, Jenna Spencer, at the Councils' home. At that time, Brianna and Jenna were four-years-old. Brianna had visited the Councils' home for play dates with Jenna about four times prior to February 17, 2011. Ms. Council had picked the girls up from preschool around 11:30 a.m. After the girls ate lunch and watched a movie, they accompanied Ms. Council outside while she provided water to the Burnetts' cows, which were boarded in the Councils' barn. Ms. Council testified at her deposition that she checked on Brianna and Jenna as she did her chores. At a point when Ms. Council was heading into the barn,

[1] Aside from their agreement for use of the pasture, the Burnetts used the Councils' property for a number of other purposes, including hunting, fishing, trapping, cattle boarding and slaughtering, and hay production. The Burnetts pay the Councils $150.00 per month for use of a field for hay growing and $35.00 per month for use of a hayloft.

Jenna ran to and notified Ms. Council that Brianna was hurt, stating that a horse had kicked her. Ms. Council went to the pasture and found Brianna sitting four to five feet away from the fence inside the pasture and crying. Ms. Council shooed several horses away and observed Brianna's injury. Seeing it was serious, Ms. Council carried Brianna back to the house and called Ms. Kalb. Ms. Kalb asked that Ms. Council meet her at Clayton Elementary School, where Ms. Kalb called 911.

Brianna was admitted to Alfred I. DuPont Hospital for Children. Brianna remained at the hospital from February 17, 2011 until March 6, 2011. She was diagnosed with a right orbital fracture, facial fractures, and a brain injury. She underwent two surgeries and ultimately had her right eye removed.

After the incident, Ms. Council found a yellow cup in the horse pasture. Ms. Council located the cup in a place close to where she found Brianna. Jenna informed Ms. Council that she and Brianna were playing with a yellow cup that blew underneath the fence. Jenna said that Brianna went under the fence to retrieve the cup, although Jenna told her not to. Jenna identified the horse that kicked Brianna as Dakota.

Mr. Burnett and Mr. Council testified at their depositions that they did not know the Burnetts' horses, including Dakota, to have aggressive propensities. Mr. Burnett testified that he "shipped off" horses that demonstrated aggression or difficulty. According to Mr. Burnett, his horses were around children, including his daughters and their friends, often. The Councils' grandchildren, Jenna and her brother, lived with the Councils on the farm for most of their lives by the time of the incident. Mr. Burnett testified that he had several conversations with Jenna instructing her not to go into the

horse pasture. He stated that no kid should go into the pasture because being around livestock is a safety issue. Specifically, Mr. Burnett testified that:

> No kid should be in my pasture. They are trespassing the way I look at it.
> . . .
> Around any livestock, any animal, it's always a safety issue.
> . . .
> Horses are horses. Horses take off running. Horses are very large, inquisitive animals. Ms.[Council] stated that the girl screamed. Any horse is going to run when you scream. They are not aggressive. Horses are horses. If she was around them in the middle of the paddock, anything could have happened.[2]

The fence that surrounds the pasture is a three-board post and rail fence. The board closest to the ground is 16 to 18 inches from the ground, depending upon the segment of the fence. At certain segments, a strand of barbed wire runs along each board on the field side to prevent horses from sticking their heads through the fence or trying to get out. Ms. Council admitted at her deposition that the fence was not designed to keep people out of the pasture. Most segments of the fence were in place when the Burnetts began using the Councils' pasture. Mr. Burnett built certain segments of the fence when he began using the pasture. At the time of the accident, the fence was not in disrepair.

The Kalbs filed their Complaint in this matter on February 14, 2012. They allege Brianna's injuries resulted from willful and wanton conduct on the part of Defendants or that Defendants were otherwise negligent. More specifically, they allege that Defendants knew of Dakota's vicious propensities and that Defendants failed to keep the horse away from small children, failed to keep the horse in a safe enclosure and failed to secure the horse on the property. The Kalbs also allege Defendants are liable under the doctrine of attractive nuisance.

[2] Dep. of Jonathan Burnett 66:2-18.

The Councils filed their Motion for Summary Judgment on March 6, 2013. The Burnetts filed their Motion for Summary Judgment on March 7, 2013. The Court heard arguments from the parties on March 19, 2013.

THE PARTIES' CONTENTIONS

The Burnetts' Motion

The Burnetts seek summary judgment, contending that they did not owe Brianna a duty, and that the Kalbs' equine expert's opinions should be excluded as unreliable because none are properly drawn from her expertise. The Burnetts also claimed they do not owe Brianna a duty because the incident causing her injury occurred on the Councils' land, there is no evidence that the fence was deficient or that the Burnetts' horses had aggressive propensities, and because Delaware law provides protections to equine professionals caused by the innate characteristics of a horse.

The Kalbs contend attractive nuisance doctrine precludes entry of summary judgment and that the Burnetts are not protected by any statute against liability. Additionally, the Kalbs argue that their proposed equine expert's opinions are admissible as she is qualified to testify by her experience and knowledge of operating horse stables.

The Councils' Motion

The Councils seek summary judgment on the basis that Brianna was a guest without payment on their land, and therefore the Councils owed her no duty but to refrain from intentional, willful, or wanton conduct under Delaware's Guest Premises Statute. The Councils also contend attractive nuisance doctrine is inapplicable to this case because the Burnetts' horses were not known to have vicious propensities or present an unreasonable risk of death or injury.

The Kalbs contend that the Guest Premises Statute does not protect the Councils because their property is not private, claiming that the Councils rent portions of it to the Burnetts in exchange for monthly payments and services rendered. The Kalbs argue that the issue of whether the Councils acted with willful and wanton disregard for Brianna's safety is an issue for determination by the jury. The Kalbs also contend attractive nuisance doctrine precludes entry of summary judgment for the Councils.

STANDARD OF REVIEW

The Court may grant a motion for summary judgment made pursuant to Superior Court Civil Rule 56 where the movant can show from the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, that no material issues of fact exist so that the movant is entitled judgment as a matter of law.[3] In considering a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party.[4] The Court should deny summary judgment where, "a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[5]

DISCUSSION

Of particular relevance to this case is Delaware's guest premises statute. That statute provides:

> No person who enters onto private residential or farm premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the

[3] Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[4] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).
[5] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

> owner or occupier or was caused by the wilful or wanton disregard of the rights of others.[6]

The Supreme Court has held that willful or wanton conduct

> assumes the character of maliciousness or wickedness . . . . Wilfulness cannot exist without purpose or design. The difference is one of kind, not degree. There is a clear distinction between wantonness and negligence, as the former term includes the elements of consciousness of one's conduct, realization of the probability of injury to another, and disregard of the consequences.[7]

Willful or wanton disregard of a plaintiff's rights – as opposed to negligence – reflects a "conscious indifference" or an "I-don't-care attitude."[8]

In *Space v. Nat'l R.R. Passenger Corp.*,[9] the United States District Court for the District of Delaware recognized an exception for children to the guest premises statute's insulation of landowners or occupants against liability to trespassers. The Court stated:

> Under the common law of Delaware, as in nearly every state, a landowner has no duty of non-negligence to trespassers. Nonetheless, it was established at common law that a landowner would be liable for an injury inflicted in a wilful or wanton manner to a trespasser.
> . . .
> In addition, the courts have recognized that because of immaturity and want of judgment, a child may be incapable of understanding and appreciating all the possible dangers which he may encounter in trespassing. Thus, an exception from the wilful or wanton standard in the case of child trespassers has long been recognized at common law. This exception developed originally through the legal fiction of "attractive nuisance" which posited that a child could be lured onto land by artifices that the defendant landowner built so that the defendant himself was responsible for the trespass. Therefore, in those circumstances where an "attractive nuisance" was found to exist, the common law allowed recovery for child trespassers if the landowner's conduct amounted to negligence. Delaware has long recognized a negligence standard in the case of child trespassers where an attractive nuisance . . . is found to exist.[10]

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[6] 25 *Del. C.* § 1501 (2012).
[7] *Bailey v. Pennington*, 406 A.2d 44, 46 (Del. 1979).
[8] *Eustice v. Rupert*, 460 A.2d 507, 509 (Del. 1983).
[9] 555 F. Supp. 163 (D. Del. 1983).
[10] *Id.* at 175 (internal citations omitted).

The Court went on to conclude that Delaware's guest premises statute ". . . does not eliminate the standards of the Restatement (Second) of Torts § 339."[11]

The Restatement (Second) of Torts § 339 ("Section 339") sets forth the doctrine commonly known as attractive nuisance. According to the Restatement, a landowner is liable for physical harm to trespassing children caused 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
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> (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
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> (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.[12]

The commentary provides guidance on how to apply Section 339 here. The commentary specifies:

> it is sufficient to satisfy the conditions stated in Clause (a) that the possessor knows or should know that children are likely to trespass upon a *part* of the land upon which he maintains a condition which is likely to be dangerous to them because of their childish propensities to intermeddle or otherwise. Therefore, the possessor is subject to liability to children who after entering the land are attracted into dangerous intermeddling by such a condition maintained by him . . . .[13]

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[11] *Id.* at 168.
[12] RESTATEMENT (SECOND) TORTS § 339.
[13] *Id.* cmt. a (emphasis supplied).

In their papers and at the hearing, the parties disagreed as to whether a horse can constitute an attractive nuisance. This issue appears settled under Delaware law. In *Coe v. Schneider*,[14] the Supreme Court of Delaware acknowledged that a horse could be an attractive nuisance.[15] In that case, a three-year-old boy wandered out of his home and across the street where a tethered pony kicked him, causing severe injuries.[16] The Court reversed and remanded an order of judgment after finding the trial court erred in refusing to give cautionary instructions to the jury after the defendant's counsel presented argument that parental supervision was relevant to a determination of negligence.[17] In reaching its conclusion, the Court relied on Delaware's adherence to Section 339, [18] observing that a parent's supervision is immaterial to an attractive nuisance analysis.[19] The only question is whether Section 339 could apply to the facts here – a horse quartered in a fenced field. The Court believes that is a fact issue for the jury to decide.

Other jurisdictions have appreciated that horses pose an inherent threat to children, and especially to children of tender years.[20] In a case with facts fairly analogous to the facts in the present matter, the Supreme Court of South Dakota concluded that "whether a horse is an 'artificial condition' within the meaning of [Section

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[14] 424 A.2d 1 (Del. 1980).
[15] *See id.*; *Schneider v. Coe*, 405 A.2d 682, 683 (Del. 1980).
[16] *Schneider*, 405 A.2d at 683.
[17] *Coe*, 424 A.2d at 2.
[18] *Id.* The Court stated,

> Liability under s 339 is predicated upon an artificial condition upon land where the possessor knows or has reason to know children are likely to trespass, and which the possessor realizes or should realize will involve an unreasonable risk of death or serious bodily harm to trespassing children who do not discover or realize the risk. Additionally, the utility to the possessor of maintaining the risk and the burden of eliminating the danger must be slight as compared with the risk to children, and the possessor must fail to exercise reasonable care to eliminate the danger or otherwise protect children.

Id.
[19] *Id.*
[20] *See Hofer v. Meyer*, 295 N.W.2d 333, 336 (S.D. 1980); Witcanock v. Nelson, 400 N.E.2d 998, 1001-02 (Ill. App. 3d 1980); *Doyle v. Monroe Cnty. Sheriff's Ass'n, Inc.*, 195 Misc.2d 358, 361-62 (N.Y. Sup. Ct. 2003).

339], is a matter to be determined by the special facts in each case."[21] In that case, a three-year-old boy was kicked and injured by a horse after entering a horse enclosure surrounded by a two-strand barbed wire fence.[22] In reaching its decision, the Supreme Court of South Dakota contemplated the inability of a child to apprehend the danger of a seemingly gentle and peaceful animal, the natural tendency of horses to kick when startled, evidence that children were occasionally seen in the area surrounding the premises at issue, and the South Dakota courts' increasing acknowledgment of the "humanitarian viewpoint that the life of a child is to be balanced as a heavy interest when weighed against the utility of simple precautions to guard against danger."[23]

In Delaware, attractive nuisance doctrine, as set forth in Section 339, protects children where the Guest Premises Statute would ordinarily insulate a landowner or land occupant from liability. [24] The Court in *Space* specifically held that, as to children, a negligence standard applies in place of the willful or wanton conduct standard for trespassing where an attractive nuisance exists upon property.[25] The Court's holding takes into account a policy similar to that adopted by the Supreme Court of South Dakota that "a child may be incapable of understanding and appreciating all the possible dangers which he may encounter in trespassing."[26] The commentary accompanying Section 339 makes clear that a child need only trespass upon a portion of a premises for the doctrine to apply.

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[21] *Hofer*, 295 N.W.2d at 336.
[22] *Id.* at 334.
[23] *Id.* at 335-37.
[24] *Space v. Nat'l R.R. Passenger Corp.*, 555 F. Supp. 163, 165 (D. Del. 1983).
[25] *Id.*
[26] *Id.*

The record before the Court contains Mr. Burnett's unequivocal statement that no child should enter his pasture and that he considers it trespassing.[27] Mr. Burnett's reasoning as to why no child should enter his pasture is that it is a "safety issue."[28] This Court acknowledges here what has been expressly acknowledged by Mr. Burnett and several other jurisdictions and implicitly acknowledged by the Supreme Court of Delaware—that horses' natural tendencies present an inherent danger to children. However, this Court does not go so far as to hold that the horses in the pasture in this case constituted an attractive nuisance. Such question is one for the jury as the triers of fact,[29] as is the question of whether the Burnetts or the Councils were negligent with regard to an attractive nuisance, if any. [30] The record contains evidence that children lived on and visited the premises and that children were expected to stay out of the horse pasture. In light of that evidence, the Court finds that a reasonably conceivable set of circumstances susceptible of proof under the Complaint exists under which the Kalbs may recover[31] on their attractive nuisance claim. Therefore, summary judgment is **DENIED** as to both the Burnetts and the Councils.

Furthermore, should the jury determine that no attractive nuisance existed in this case, then Delaware's Guest Premises Statute is applicable.[32] In that event, the question of whether conduct was willful or wanton is also one for the jury.[33] The Court could

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[27] Dep. of Jonathan Burnett 66:2-6.
[28] *Id.* 66:5-6.
[29] *See Hofer v. Meyer*, 295 N.W.2d 333, 336 (S.D. 1980).
[30] *See Coe v.Schneider*, 424 A.2d 1, 2 (Del. 1980).
[31] *See Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[32] As stated on the record at the hearing on March 19, 2013, the Court is not persuaded by arguments that the statute is inapplicable on the basis that the Councils' property was not private because the Councils agreed to let the Burnetts use land in exchange for consideration including payments. Such a holding would discourage land owners and occupiers from letting portions of their premises to others, by exposing them to liability that the statute does not contemplate in using the word "private." *See* 25 *Del. C.* § 1501.
[33] *Eustice v. Rupert*, 460 A.2d 507, 509 (Del. 1983).

grant summary judgment if the only reasonable inference was that Defendants did not willfully or wantonly disregard Brianna's rights;[34] however, the Court does not find that such an inference is clear. Reasonable minds may differ in concluding whether Defendants' acts and omissions respecting maintenance of the horses, the pasture, and conditions surrounding them amount to willful and wanton conduct. Additionally, an "occupier" under the Guest Premises Statute can be an owner, a tenant, or any other party exercising physical control and dominion over property.[35] Since both the Burnetts, as tenants, and the Councils, as owners, can fairly be viewed as having had control over the premises at issue, a genuine issue of material fact exists as to whether the statute would apply to the Burnetts, the Councils, or to both parties. For these additional reasons, summary judgment is **DENIED** as to both the Burnetts and the Councils.

Having identified two bases to deny summary judgment, the Court need not address the remaining grounds for summary judgment asserted by the Burnetts. Nonetheless, the Court finds the statutes cited by the Burnetts, 25 *Del. C.* § 1301[36] and 10 *Del. C.* § 8140[37] are inapplicable to this case. Additionally, and without ruling on the admissibility of the opinions of the Kalbs' proposed expert, the Court finds they are not a basis for summary judgment at this time. The matters at issue are not outside the ken of a typical juror, and therefore expert testimony is not necessary for the Kalbs to set forth a standard of care or establish proximate cause.[38]

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[34] *See id.*
[35] *Stratford Apartments, Inc. v. Fleming*, 305 A.2d 624, 626 (Del. 1973).
[36] This provision defines the type of fence necessary for a property owner to seek damages resulting from trespass by animals. 25 *Del. C.* § 1301 (2012).
[37] This provision insulates equine professionals against liability for injuries to participants of equine activities resulting from the inherent risks of equine activities. 10 *Del. C.* § 8140 (2012). The statute defines "equine activity," and a child's entry into an area where horses are kept is not contemplated by the statue. *Id.*
[38] *See Cruz v. G-Town Partners, L.P.*, 09C-08-218, 2010 WL 5297161, at *14 (Del. Super. Dec. 3, 2010).

CONCLUSION

For the reasons stated above, genuine issues of material fact remain as to the applicability of attractive nuisance doctrine, and alternatively, whether Defendants committed willful and wanton conduct so as to owe Brianna a duty to protect her from injury. Therefore, Defendants' Motions for Summary Judgment are **DENIED**.

IT IS SO ORDERED.

/s/ Eric M. Davis
Eric M. Davis
Judge