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

TASHELL WILSON and GERMAYNE EMORY,	)	
Plaintiffs,	)	
v.	)	
	)	C.A. No. 08C-08-135 PLA
ANDRE URQUHART, ANITA URQUHART, TRACY L. BROWN, TIERA BROWN, TAPPITCHAR BASS, and AMBER JONES,	)	
Defendants.	)	

ON DEFENDANT TRACY L. BROWN'S
MOTION FOR SUMMARY JUDGMENT
GRANTED

ON DEFENDANT TIERA BROWN'S
MOTION FOR SUMMARY JUDGMENT
GRANTED

Submitted: June 1, 2010
Decided: July 6, 2010

Vincent J. X. Hedrick, II, Esquire, and Beverly L. Bove, Esquire, BEVERLY L. BOVE, ATTORNEY AT LAW, Wilmington, DE, Attorneys for Plaintiffs.

Arthur D. Kuhl, Esquire, REGER RIZZO & DARNALL LLP, Wilmington, DE, Attorney for Defendants Tracy L. Brown and Tiera Brown.

ABLEMAN, J.

I. Introduction

Plaintiffs Tashell Wilson and Germayne Emory brought this wrongful death action following the death of their seven-year-old son Damond Emory. Damond's body was found in a residential swimming pool during a party organized by Defendant Tiera Brown for her daughter's second birthday. Damond, who could not swim, had been brought to the party by a babysitter.

Tiera Brown and co-defendant Tracy Brown, her mother, moved for summary judgment on the basis that they were not under any duty to supervise Damond on the day of his death and did not act unreasonably in arranging the party. Plaintiffs counter that the Browns created a foreseeable risk of harm by holding a pool party to which they invited numerous children without ascertaining whether the children could swim, by failing to issue safety instructions, and by neglecting to provide adequate adult supervision. Plaintiffs contend that the Browns were obligated to take affirmative steps for Damond's protection because the pool was a hazard and an attractive nuisance to children.

For the reasons discussed herein, the Court finds that the Browns were not subject to a duty to supervise or warn Damond of the obvious hazards posed by the pool because his babysitter attended the party and remained responsible for his supervision. The Court cannot reach the merits of

Plaintiffs' premises liability arguments, because the Second Amended Complaint in this case has not properly pled claims for premises liability against the Browns. Accordingly, the Motions for Summary Judgment filed by Defendants Tiera and Tracy Brown must be **GRANTED**.

II. Factual and Procedural Background

Tiera Brown[1] began planning her young daughter's second birthday in the spring of 2008. Andre and Anita Urquhart, the parents of Tiera's longtime friend Amber Jones, agreed to let Tiera use their in-ground pool and deck area for the party because Tiera had enjoyed past pool parties at their home. The Urquharts did not discuss any safety rules or issues with Tiera in advance of the event.

Tiera decided on June 15 for the date of the party and designed invitations, which stated that invitees should bring swimming gear to use the pool. She invited approximately forty people, most of whom were adult friends or relatives who had children of their own that they could bring to the party.[2] Tiera gave one of the invitations to Tappitchar Bass, who was friends with Tracy Brown and had known Tiera since she was young.

[1] As several parties to this case share the same surnames, the Court will refer to individuals by their first names where clarity demands it.

[2] Dep. Tr. of Tiera Brown (July 28, 2009), at 32:4-5.

The party began at 3:00 P.M. on June 15. Tracy took responsibility for food preparation, and remained in the Urquharts' house throughout the party. The Urquharts were apparently home at the time, but they stayed inside the house and did not assist or participate. Per the invitation, some of the parents at the party, including Tiera, brought their own floatation devices for their children to use in the pool. Before or during the party, the Urquharts' pool noodles and floatation devices were brought out of a storage shed and displayed where the partygoers could access them.

About an hour into the party, Bass arrived with several children, including Plaintiffs' seven-year-old son, Damond. Tiera did not know Damond and he had not been invited to the party, but several of her invited adult guests had brought uninvited children or close relatives, and she was not excluding them.[3] Bass or her sister had been babysitting Damond that day, and had found his parents were not in when they took him home. Bass therefore decided to take him with her to the party.

In total, there were approximately twenty children under the age of 18 at the party.[4] Damond joined several boys playing in the pool. As Tiera carried on other activities and attended to her guests, she observed numerous

[3] *Id.* at 41:6-9.

[4] *Id.* at 46:3-11.

adults watching the children in the pool. Tiera recalls the adults instructing a group of boys to move away from the pool's deep end on several occasions.[5] Tiera personally approached three or four boys when she saw them holding onto the wall of the pool. She brought them over to shallow water and told them that if they wanted to be in depths where they had to hold the wall, they should "get a noodle, get something" from the Urquhart's store of floatation devices.[6] At another point in the evening, adult guests watching the pool had to tell a boy to stop hanging from the underside of the diving board.

At approximately 6:00 P.M., the adults helped the children out of the pool so that all the partygoers could sing Happy Birthday and have cake.[7] Although it took several minutes to round up those in the pool, the pool appeared empty to Tiera when the cake was brought out. Several children returned to the pool after eating. About half an hour later, Tiera began opening presents with her daughter and several adults went to retrieve the children who had returned to the water. Tiera heard yelling and a splash. Damond had been found at the bottom of the pool, and an adult guest had

[5] *Id.* at 52:22-56:24.

[6] *Id.* at 60:1-3.

[7] *Id.* at 68:14-21.

dived in to retrieve him. The same guest immediately attempted CPR and was able to clear food from his airway, but Damond ultimately died. The medical examiner found that the cause of Damond's death was drowning due to neck trauma. No witnesses were able to pinpoint when or how Damond had returned to the pool, nor how his accident occurred.

Plaintiffs brought this wrongful death action against Tappitchar Bass, Andre and Anita Urquhart, Amber Jones, and Tracy and Tiera Brown, asserting claims of intentional and negligent conduct against each of the defendants. Tiera and Tracy Brown each moved for summary judgment on March 12, 2010. Plaintiffs' claims against the other defendants have been resolved by settlement.

III. Parties' Contentions

By their motions, Tracy and Tiera Brown assert that they owed no duty to Damond Emory based upon his status as an uninvited attendee accompanied by a babysitter responsible for his supervision. The Browns argue that Plaintiffs have offered no basis for imposing the duties asserted in their Second Amended Complaint. Moreover, the Browns contend that even if the duties described in Plaintiffs' Complaint apply, no evidence exists to support that either of them breached those duties. Tracy Brown further

argues that she was an attendee at her granddaughter's birthday party, not an organizer or social host, and that any duty grounded in Tiera Brown's status as the party's host is inapplicable to her.

Plaintiffs' initial response to the Browns' summary judgment motions raised issues that prompted the Court to order two rounds of additional briefing from the parties. Plaintiffs contend that by hosting or attending a pool party to which they invited child guests, Tiera and Tracy Brown assumed responsibility for providing adequate supervision.[8] Furthermore, Plaintiffs allege that by using the Urquharts' pool for the party, the Browns caused Damond to encounter an attractive nuisance, a theory they also propound in a separate lawsuit filed during the pendency of these motions. According to Plaintiffs, the "special hazards and public policy concerns implicated in providing a pool to small children" created a heightened duty of care.[9] Plaintiffs draw an analogy to *DiOssi v. Moroney*,[10] in which social hosts were found subject to a duty to safeguard against the risks to a hired valet posed by minor party guests' driving under the influence of alcohol served at their party. Plaintiffs have also cited several cases in various

[8] *See* Pls.' Supplemental Opp'n to Defs.' Mots. for Summ. J. (May 21, 2000), ¶ 3.

[9] *Id.* ¶ 4.

[10] 548 A.2d 1361 (Del. 1988).

jurisdictions to support the imposition of a duty to supervise a child guest, particularly in the presence of a known hazard such as a swimming pool.[11]

IV. Standard of Review

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[12] Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.[13] If the proponent properly supports its claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[14] Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are no material facts in dispute and judgment as a matter of law is appropriate.[15]

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[11] *See Laser v. Wilson*, 473 A.2d 523 (Md. Ct. Spec. App. 1984); *Royal v. Armstrong*, 524 S.E.2d 600 (N.C. Ct. App. 2000); *Scheibel v. Lipton*, 102 N.E.2d 453 (Ohio 1951).

[12] Super Ct. Civ. R. 56(c).

[13] *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

[14] *Id*. at 880.

[15] *Id*. at 879-80.

IV. Analysis

A. Duties of Supervision and Warning

To maintain an action for negligence, the plaintiff must establish that the defendant was subject to "a duty to protect the plaintiff from the risk of harm that caused the injury."[16] Whether or not a duty arises on the facts of a particular case is a question of law.[17]

As a necessary element of a negligence claim, the concept of duty provides a limitation on liability, requiring that the defendant be shown to have borne a "definite legal obligation" to the plaintiff.[18] The Court's task in determining the existence of a duty requires it to decide whether such "a relationship exists between the parties that the community will impose a legal obligation upon one for the benefit of the other."[19] Such a relationship may be grounded in "contract, statute, municipal ordinance, administrative regulation, common law, or the interdependent nature of human society," or

[16] *Achtermann v. Bussard*, 2007 WL 901642, at *2 (Del. Super. Mar. 22, 2007), *aff'd sub nom. Achtermann v. Warrington*, 957 A.2d 1 (Del. 2008).

[17] *Id.*

[18] *See In re Asbestos Litig.*, 2007 WL 4571196 (Del. Super. Dec. 21, 2007), *aff'd sub nom. Riedel v. ICI Ams. Inc.*, 968 A.2d 17 (Del. 2009) (quoting *James v. Meow Media, Inc.*, 300 F.3d 683, 690 (6th Cir. 2002)).

[19] *See Naidu v. Laird*, 539 A.2d 1064, 1070 (Del. 1988) (quoting W. KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 37, at 236 (5th ed. 1984)).

may have its genesis in "the particular facts and circumstances of the case."[20]

Both courts and commentators have grappled, to mixed success, with articulating a rational and consistent basis for discerning when the relationship between parties imposes a duty of care on the defendant.[21] Although the search for a unified theory of duty persists, the Restatement (Second) of Torts offers several principles that guide Delaware courts' duty analyses.[22] The Restatement (Second) utilizes the term "duty" as a means "to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause."[23] Comment (a) to § 302 of the Restatement explains that the existence and scope of a defendant's duty may differ depending upon whether his conduct involves misfeasance or nonfeasance:

> In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect

[20] 57A AM. JUR. 2D *Negligence* § 82 (2010); *see also In re Asbestos Litig.*, 2007 WL 4571196, at *4.

[21] *See In re Asbestos Litig.*, 2007 WL 4571196, at *4-8.

[22] *Riedel*, 968 A.2d at 20.

[23] RESTATEMENT (SECOND) OF TORTS § 4.

> them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. . . . If the actor is under no duty to the other to act, his failure to do so may be negligent conduct . . . but it does not subject him to liability, because of the absence of duty.[24]

As the commentary to § 314 explains, early common law approached or achieved strict liability for the conduct of those who injured others by "positive affirmative" actions, while rarely imposing liability upon those "who merely did nothing, even though another might suffer serious harm" as a result of nonfeasance.[25] Thus, liability for the failure to act "appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff."[26] Several sections of the Restatement describe the "special relations" (such as a defendant's status as a common carrier or custodian of the plaintiff) and other circumstances that may subject a defendant to liability for nonfeasance.[27]

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[24] *Id.* § 302 cmt. a.

[25] *Id.* § 314 cmt. c.

[26] *Id.*

[27] *See id.* §§ 314A, 315-324A.

Plaintiffs' claims against the Browns in Count III and Count IV of the Second Amended Complaint allege both misfeasance and nonfeasance. Plaintiffs first assert that Tracy was liable for attending, and Tiera for hosting, a pool party attended by "young children who potentially did not know how to swim."[28] These portions of the Complaint essentially posit that the Browns engaged in affirmative acts of negligence—misfeasance, in other words—by causing child guests to encounter the pool. Plaintiffs also allege that Tracy and Tiera Brown failed to provide adequate supervision and failed to warn "relevant parties" regarding the lack of supervision of the pool.[29] These alleged failures to supervise and to warn constitute nonfeasance.

As an initial matter, the Court considers Tracy to be situated differently from her daughter with regard to the questions of duty implicated by the Browns' separate motions. Tracy's contributions to the party's organization entailed assisting with the food preparation and the purchase of decorations. She stayed inside the Urquhart's house during the party, and thus did not participate in or observe any of the pool activities.[30] Unlike her

[28] Pls.' Second Am. Compl., ¶¶ 16, 18.

[29] *Id.*

[30] Dep. Tr. of Tiera Brown, 36:23.

daughter, Tracy did not select the location of the party or determine the invitation list, aside from reminding Tiera to invite certain members of their social circle. Indeed, Plaintiffs' Complaint does not allege that Tracy acted as a party host or organizer; instead, the Complaint claims that Tracy is liable for failing to provide supervision or warning in the course of *attending* the party.[31] Mere attendance at a party does not support the existence of any affirmative duty to act for the protection of a fellow attendee, and Plaintiffs have not offered facts supporting that Tracy engaged in "negligent attendance" in a manner that caused Damond's death, much less any evidence of intentional, wanton, or reckless conduct. The Court therefore concludes that Tracy Brown is entitled to summary judgment on Plaintiffs' Count III claim against her.

With regard to Tiera's obligations, the issue of duty is somewhat more complex. By organizing and hosting a party, Tiera subjected herself to a duty to use reasonable care to prevent the party from causing an unreasonable risk of harm to her guests.[32] As Plaintiffs put it, Tiera was required to "avoid conduct which constitute[d] ordinary negligence."[33] The

[31] Pls.' Second Am. Compl., ¶16.

[32] RESTATEMENT (SECOND) OF TORTS § 302 cmt. a.

[33] Pls.' Supplemental Opp'n to Defs.' Mots. for Summ. J., ¶ 4 (citing *Porter v. Delmarva Power & Light Co.*, 547 A.2d 124, 129 (Del. 1988)).

Court will also accept, for the sake of argument, Plaintiffs' position that this duty extended to Damond despite the fact that he was unknown to the Browns and was not an invited party guest; by her deposition testimony, Tiera indicated that she saw Damond at the party and allowed him to remain even though he had not been invited. Furthermore, the Court agrees with Plaintiffs that Tiera's duty to avoid negligent conduct in hosting the party existed regardless of the fact that the party occurred on property owned by another. The Court considers this duty to be distinct from any premises occupier duties that might derive from Tiera Brown's use of the Urquhart's pool as a party venue; as will be explained further below, Plaintiffs' claims of premises liability were raised far too late to be considered as part of this case.

Nevertheless, while it poses certain risks, a swimming pool is not an inherently dangerous instrument.[34] Tiera's decision to host a pool party with children in attendance was not, taken alone, intrinsically negligent conduct, nor did that decision render her strictly liable for all pool-related injuries that occurred at the party.

[34] *Crouch v. Lindsey*, 1982 WL 533641, at *1 (Del. Super. Sept. 3, 1982), *aff'd*, 461 A.2d 692 (Del. 1983).

Moreover, to say that Tiera was under a duty to refrain from active negligent conduct in hosting the party does not automatically imply that she was obligated to take affirmative steps to supervise child guests accompanied by other adults responsible for their care. The Court is guided by well-reasoned decisions from several other jurisdictions holding that social hosts are not burdened by any duty to supervise or to warn child guests regarding obvious dangers when a parent or guardian is present and aware of the danger, and the social host has neither assumed nor been asked to assume responsibility for supervising.[35]

The Maryland Court of Special Appeals engaged in a thorough exploration of social hosts' duties to child guests in *Laser v. Wilson*.[36] In that case, parents of a two-year-old boy brought him to a family Christmas party held at the home of the boy's aunt and uncle. The boy's father was cautioned upon their arrival at the house that the guardrail and handrail had been removed from a particular staircase, and that he should watch the boy closely. The child's mother left him with his grandparents and other guests

[35] *See Horace ex rel. Horace v. Braggs*, 726 So. 2d 635 (Ala. 1998); *Laser*, 473 A.2d at 529 ("[W]here the infant licensee by invitation remains with and under supervision of its parents any added responsibility to a child guest is superseded by the parents accompanying him. We are not persuaded that because a child is a licensee by social invitation, the host's duty is any more than he agrees to assume by his invitation." (internal citation omitted)).

[36] 473 A.2d at 528-29.

while she assisted with setting out a family meal. The boy apparently wandered off and fell down the affected stairs.[37] The fall resulted in severe injuries, and the boy's parents brought suit against his aunt and uncle, who were the premise owners and hosts of the gathering.

The *Laser* Court affirmed a directed verdict in favor of the social hosts and held that although a "property owner's duty to a child social guest may be inversely proportional to the child's age," the duty to supervise and protect the child from known or obvious dangers is "a *derivative parental duty*" that can only be "assumed by conduct or expression of the parents and host."[38] The court emphasized that a parent's duty to supervise his or her child and protect him from known or obvious dangers is a serious responsibility that "may be relinquished or obtained only upon the mutual consent, expressed or implied, by the one legally charged with the care of the child and by the one assuming the responsibility."[39] Thus, a parent cannot "impose the responsibility of supervision of his or her minor child on a third person unless that person accepts the responsibility, and a third

[37] *Id.* at 524-25.

[38] *Id.* at 529 (emphasis added).

[39] *Id.* at 528.

person may not assume such responsibility unless the parent grants it."[40] Accordingly, the *Laser* Court found that a parent's presence obviates any heightened duty of care based upon the child's age:

> [I]f a condition is open and obvious rather than latent or obscure, no greater duty is imposed upon a host of a child under parental supervision than would be owed to the parent. If the parent has either been warned, or if the condition is or should be obvious to the parent, the parents' failure properly to supervise its child is the proximate cause of a subsequent injury. The host is not negligent because he has performed his duty of having the premises as safe for his guest as for his family and himself. . . . [W]here the infant licensee by invitation remains with and under supervision of its parents any added responsibility to a child guest is superseded by the parents accompanying him.[41]

Although a social host might expressly or implicitly assume supervisory responsibility for a child with the parents' consent, the *Laser* Court concluded that merely extending an invitation to the child's parents—and by extension, to the child himself—was insufficient to "thrust upon [the social host] the care and welfare responsibilities of the parent."[42]

On facts even closer to the instant case, the Alabama Supreme Court applied the same reasoning in *Horace ex rel. Horace v. Braggs* to bar a negligence claim brought against the social host of a pool party held on

[40] *Id.* at 528-29.

[41] *Id.* at 529 (internal citations omitted).

[42] *Id.*

another's land.[43] The defendant social host in *Horace* held a birthday pool party on her sister's property and invited numerous relatives, including more than a dozen children under the age of thirteen. Plaintiff Ashley Horace, who was then five years old, was brought to the party by her father. Her father remained in attendance, but instructed Ashley's older brother to watch her in the pool. During the course of the party, some of the other child guests discovered Ashley at the bottom of the pool. She survived her ordeal, but suffered permanent brain damage.[44]

Ashley and her father filed suit against the host for negligently or wantonly failing to "provide a safe place that was watched by adult supervision for the minor child to swim," thereby "allowing the child to enter the pool area and fall in."[45] The trial court granted summary judgment in favor of the host, and the Alabama Supreme Court affirmed on appeal. In its decision, the *Horace* Court emphasized that there was "no evidence indicating that primary duty for supervising Ashley had shifted" to the social host, who was busy attending to other guests, and that Ashley's father knew

[43] 726 So. 2d at 637-39.

[44] *Id.* at 636.

[45] *Id.*

she was playing in the pool.[46] Relying in part upon *Laser*'s discussion of the parental origin of the duty to supervise a child, the Alabama Supreme Court held that the host of a social gathering held on another's land bears no duty to supervise a child guest's activities in the landowner's pool "*while the child's parent or guardian is present on the premises*, and where the social host has not been requested, and has not volunteered" to supervise.[47]

The Appellate Court of Illinois addressed the existence of a social host's duty to an accompanied child guest in *Englund v. Englund*,[48] which involved the drowning of a three-year-old girl in an above-ground pool. The court affirmed summary judgment in favor of the landowner social host on the basis that she owed no duty to protect the child from the obvious danger posed by the pool when a parent was present, knew of the pool and her daughter's proximity to it, and was aware that the host was occupied with attending to other guests and was not supervising children in the pool or yard area.[49] The court concluded that "it was not foreseeable that plaintiff [the girl's mother] would fail to supervise her daughter adequately, and . . . we

[46] *Id.* at 639.

[47] *Id.* at 636 (emphasis in original).

[48] *Englund v. Englund*, 615 N.E.2d 861 (Ill. App. Ct. 1993).

[49] *Id.* at 867.

will not require the homeowners to anticipate negligence on plaintiff's part and guard against it."[50]

The Court discerns no material basis upon which to distinguish this case from *Laser*, *Horace*, *Englund*, or similar cases from other jurisdictions concluding that, absent an express or implied shifting in supervisory responsibility, a social host or landowner owes no duty to supervise or warn a child guest under the care of a parent, guardian, or other person entrusted with his welfare who is on the premises and aware of a danger to the child.[51] While jurisdictions vary in their standards for when a duty is imposed, Delaware's focus on the legal relationship between the parties and its adoption of the Restatement compel this Court to reach the same conclusion.

Damond was under the care and supervision of Tappitchar Bass during the party, as Plaintiffs acknowledged in bringing an action against

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[50] *Id.*

[51] *See Moses v. Bridgeman*, 139 S.W.3d 503, 510 (Ark. 2003) ("A swimming pool is an open and obvious danger for children and adults, particularly for those who cannot swim well. It is significant that [the child's] mother was supervising him along with [the host] and the other adults present. Thus . . . we do not impose a greater duty upon the host . . . than would be imposed on the parent[.]"); *Padilla v. Rodas*, 73 Cal. Rptr. 3d 114, 119 (Cal. Ct. App. 2008) ("Imposing a duty [upon a homeowner to supervise child guests who are under the primary supervision of a parent] . . . would unreasonably burden social and family relationships, requiring homeowners to provide baby-sitting services for their guests' young children when the children's parents also were on the premises."); *Herron v. Hollis*, 546 S.E.2d 17, 19-20 (Ga. Ct. App. 2001); *Stopczynski v. Woodcox*, 671 N.W.2d 119, 124-25 (Mich. Ct. App. 2003).

Bass for negligent supervision.[52] The risks associated with bringing children to a pool party should have been apparent to Bass. Based upon the deposition testimony of Bass and the Browns, it also would have been obvious that there was not a lifeguard or formalized roster of adults watching the pool, and that Tiera was occupied with carrying out other party activities. In short, Bass remained primarily responsible throughout the party for supervising the children she brought with her, including Damond.

While hosting the party placed Tiera under a duty to avoid creating an unreasonable risk of harm to any of her guests, there is no evidence that she violated this obligation or that the scope of her duty expanded to encompass Damond's supervision. The party was not an event at which children were dropped off and left in the host's custody; Damond, like all of the child guests, was brought to the party by an adult who remained on the premises, and Tiera's belief that her adult guests would retain responsibility for supervising the children they accompanied was reasonable. Hosting a party, without more, does not impose a duty to supervise or warn child guests who are accompanied by an adult responsible for their care with regard to obvious dangers, nor does it turn the host into a guarantor of her child

[52] Pls.' Second Am. Compl., ¶ 14.

guests' safety.[53] That Bass was Damond's babysitter rather than his parent does not affect the duty analysis vis-à-vis Tiera. Tiera did not know Damond, and neither the special relationships described in the Restatement nor the particular facts of this case suggest that she bore any affirmative duty to act for his protection. Bass did not request that Tiera supervise Damond, nor did Tiera expressly or implicitly offer to do so.

As in the *Englund* decision, the Court further finds that Tiera was not under a duty to anticipate the possibility that Bass would not adequately supervise Damond.[54] Both Tiera and Bass believed, consistent with the relevant legal principles, that Bass was responsible for supervising the children she brought, and none of the events of the party prior to the discovery of Damond's body would have given Tiera reason to suspect that children were being permitted to play in the pool without supervision. To the contrary, at least up to the time the pool was cleared for the presentation of the cake, multiple adults were actively supervising the pool area and cautioning children who engaged in potentially risky play. When those in

[53] *See Padilla*, 73 Cal. Rptr. 3d at 119 ("Imposition of such a duty on homeowners would make them insurers of their guests' children's safety even when the parents are also present on the premises, a burden that is beyond all reasonable expectations of both homeowners and their guests.").

[54] Indeed, on the record before the Court, a trier of fact might reasonably determine that Damond's death was not caused by negligent supervision on Bass's part.

the pool were called over for cake, Tiera confirmed that none of the children were straggling. If Damond was in the water at that time, he had already met with his accident despite several adults' monitoring.

The Court also rejects Plaintiffs' theory that Tiera Brown assumed a duty to supervise and provide safety floatation devices for all of the children because she displayed floatation devices during the party, brought a safety float for her own daughter from home, and suggested that children who were gripping the pool walls use pool noodles. Even assuming *arguendo* that items such as pool noodles qualify as safety equipment, Plaintiffs have not identified any authority to support the argument that providing or offering floatation devices and toys to children at a pool party imposes a responsibility to provide safety devices to all. Not all children require a floatation device to play safely in a pool. A child's need will depend upon a variety of factors, including age, the particular activities in which the child is engaged, and the child's swimming proficiency and comfort in the water. When a parent or guardian is present and responsible for a child's supervision, whether that child is using a safety device will be obvious to the supervising adult. That adult bears responsibility for determining the child's requirements and ensuring that the child receives and uses any necessary

safety equipment while in the pool.[55] Tiera's decision to use a floatation device for her two-year-old daughter was such an exercise of parental responsibility; it did not subject her to a duty to assess and supervise the children who were in the care of other adults. Because floatation devices were on display, other parents and guardians had the same opportunity to decide whether their use was necessary for the children they accompanied.

The cases cited by Plaintiffs to support the existence of a supervisory duty are inapposite. Plaintiffs raise *Royal v. Armstrong* for the proposition that "[a] host of a child's pool party is in a position 'somewhat analogous to that of a paid teacher or day care provider . . . entrusted with the welfare of a child.'"[56] *Royal* involved a party at which the child guests were left by their parents in the care of the host, who thereby assumed responsibility for their supervision. This critical factual difference distinguishes *Royal* from this case, where the key issue is whether the act of hosting alone shifts supervisory duty when a parent or guardian is present.

[55] *See Moses*, 139 S.W.3d at 510 (holding that where social host provided life jackets for child swimmers, a parent who was in attendance and supervising child bore responsibility for ensuring that child did not remove his jacket).

[56] Pls.' Supplemental Opp'n to Defs.' Mots. for Summ. J., ¶ 9 (quoting *Royal*, 524 S.E.d at 603).

Plaintiffs rely upon *Kuczynski v. McLaughlin*[57] to suggest that this case "present[s] the classic scenario where the law will impose a duty of care" because of the foreseeability of harm resulting from the children's use of the pool.[58] *Kuczynski* addressed the duties of a powerboat's captain acting as the "lead vessel" for a trailing boat to warn of an impending collision with a third party's boat.[59] The Court concluded that the lead vessel's captain owed a duty of care to others boating in close proximity. *Kuczynski* provides limited insight into the question of whether a supervisory duty shifted between individuals, rather than whether it existed at all. Indeed, the undisputed foreseeability of harm posed by children playing in a swimming pool weighs *against* imposing an affirmative duty to supervise or warn upon Tiera, because it establishes that Bass should have known of the risks.

Plaintiffs also compare this case to *DiOssi v. Moroney*, arguing that "providing a pool to minors who could not swim" created a hazard akin to providing alcohol to minors and permitting them to drive, and thus subjected

[57] 835 A.2d 150 (Del. Super. 2003).

[58] Pls.' Supplemental Opp'n to Defs.' Mots. for Summ. J., ¶ 7.

[59] 835 A.2d at 155-56.

the Browns to an affirmative duty of protection.[60] In *DiOssi*, the plaintiff was a valet employed by the defendant social hosts for an event on their property, during which an intoxicated minor struck the plaintiff with a car.[61] The business invitee relationship between the defendants and the plaintiff supported the imposition of an affirmative duty on the defendants to take reasonable steps to provide a safe workplace by safeguarding against the particular hazard of minors' drinking and driving that their activities created.

The facts and claims in this case differ from *DiOssi*. *DiOssi* was a premises liability case involving a business invitee. As will be discussed further below, the Court has determined that Plaintiffs cannot proceed against the Browns on a premises liability theory in this action. The *DiOssi* decision also noted that the question of whether the defendants could reasonably have expected that the plaintiff would discover or realize the hazards posed by intoxicated minors on the property was "fact intensive" and thus not susceptible to determination as a matter of law. By contrast, in this case, Bass knew that she was going to a pool party, and Plaintiffs have not alleged that Damond's accident resulted from anything other than the risk of accidental injury or drowning that would have been obvious to any

[60] Pls.' Supplemental Opp'n to Defs.' Mots. for Summ. J., ¶ 4.

[61] 548 A.2d at 1362-63.

adult bringing a child to a pool-centered event. Furthermore, unlike serving alcohol to a minor, hosting a pool party with child guests is not an illegal act that violates public policy.[62] There is no evidence in this case that Tiera Brown engaged in misfeasance in choosing to hold a pool party with children present or in her hosting of the event.

Plaintiffs also argue that deposition testimony from Tiera Brown that she should have designated an adult to act as a "lifeguard," as well as the report of their expert, establish that the Browns "owed duties to the Plaintiffs and breached them."[63] Tiera's deposition testimony was not a concession of liability or conclusion of law, but an expression of regret. In the wake of an accident, it is natural for a layperson to state that she could or should have taken certain preventive measures, but this does not necessarily mean that she was under a duty to do so at the time.[64] Whether a duty exists is not settled by a defendant's regrets or a plaintiff's expert report; it is a legal question that must be determined by the Court.

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[62] *See id.* at 1368.

[63] Pls.' Opp'n to Defs.' Mots. for Summ. J. (April 21, 2010), at ¶ 3.

[64] *See Englund*, 615 N.E.2d at 868 ("[E]ven if the homeowners acknowledged that they were lax in their attention to [the child], this does not relieve [the child's parent] of her duty [to supervise] . . . and does not render the homeowners liable . . . .").

The loss of a child is tragic, and as Plaintiffs note, there are many situations in which the law recognizes the special vulnerability of children by imposing heightened obligations upon the adults around them. Nevertheless, this case does not reflect one of those circumstances, and for sound reasons. The obligation to supervise and care for a child is a profoundly important and weighty duty, and the law seeks to vindicate the "reasonable expectations of both [hosts] and their guests" in determining where that duty rests in a given social situation.[65] As a theoretical notion, imposing a blanket duty upon social hosts to supervise all child guests regardless of whether a parent or guardian is present might make children safer. However, that safety is likely to result not from increased vigilance by hosts, but rather from the increased isolation of children from the social lives of their communities and families as hosts decline to take the risk that they may be held accountable as insurers of their child guests' safety.

Thus, the Court finds that Tiera Brown did not owe a duty to supervise or warn Damond, and that there is no evidence that she breached her duty to exercise due care to avoid creating an unreasonable risk of harm in hosting her daughter's birthday party. Summary judgment as to Count IV

[65] *Padilla*, 73 Cal. Rptr. 3d at 119.

of Plaintiffs' Second Amended Complaint will therefore be granted in her favor.

B. Premises Liability and Attractive Nuisance

Plaintiffs' response to the Browns' summary judgment motions has also focused on the Browns' duties as "possessors of the pool and deck area"[66] and thus "*de facto* landowner[s]" during the party.[67] Plaintiffs argue that the duties imposed upon premises occupiers apply to the Browns, and that they are subject to liability on the basis that the swimming pool was an attractive nuisance.

Counts III and IV of the Second Amended Complaint, which contain the Plaintiffs' claims against Tracy and Tiera Brown, make no reference to the premises (other than mentioning that the Urquharts' residence had a pool), to premise occupiers' duties, or to attractive nuisance liability. Premises liability and attractive nuisance doctrine are referenced explicitly in Count I, which names only Andre and Anita Urquhart. Because each count of the Complaint incorporates by reference all of the preceding paragraphs, Plaintiffs argue that they have sufficiently pled premises liability and attractive nuisance.

[66] Pls.' Opp'n to Defs.' Mots. for Summ. J., ¶ 4.

[67] Pls.' Supplemental Opp'n to Defs.' Mots. for Summ. J., ¶ 8.

Perhaps concerned about the strength of this position, Plaintiffs filed a separate suit against Bass and the Browns while supplemental briefing on the motions for summary judgment was outstanding. The Complaint in this second action explicitly alleges theories of premises liability and attractive nuisance.[68] Plaintiffs sought to consolidate the two cases, and the Court denied the motion on the basis that both the discovery and dispositive motion deadlines in this action had already closed without any opportunity for the parties to develop the facts and arguments necessary to litigate the issue of the Browns' potential liability as "*de facto* landowners."

Plaintiffs' theories of premises liability and attractive nuisance were not properly pled in this case. Superior Court Civil Rule 9(b) requires that all averments of negligence be pled with particularity. In the Second Amended Complaint filed in this case, Plaintiffs' premises liability and attractive nuisance claims were pled with particularity as to the Urquharts, but not the Browns. Incorporation by reference is insufficient to salvage this defect under the circumstances. All that incorporating the prior paragraphs of the Second Amended Complaint accomplished was to place the Browns on notice that Plaintiffs considered *the Urquharts* subject to premises liability. The Browns did not own or reside on the Urquharts' property, and

[68] Compl., *Wilson v. Bass*, C.A. No. 10C-05-041 (Del. Super. May 5, 2010).

the Urquharts were present on the property for at least some portion of the party. Neither Plaintiffs nor the Browns developed a factual record during discovery regarding the Browns' control over and knowledge of the premises. Both a factual record and significant briefing would be necessary for the parties and this Court to evaluate Plaintiffs' position that temporarily using a family friend's pool may result in premises occupier status. There was simply no reasonable basis for the Browns to expect that they needed to prepare a defense to premises-related claims until Plaintiffs' first response to their summary judgment motions.

While an amendment to the Complaint might have offered an appropriate resolution to Plaintiffs' failure to plead at an earlier point in the litigation,[69] Plaintiffs cannot inject entirely new theories of negligence into the case after discovery and dispositive motion practice have closed without an opportunity for the Browns to develop a defense. Because Plaintiffs have not properly presented a claim against the Browns for premises liability in this case, their references to these theories in response to the Browns' summary judgment motions are irrelevant.

VI. Conclusion

[69] *See Cebenka v. Podiatry Assocs.*, 1986 WL 6568, at *2 (Del. June 2, 1986).

For the foregoing reasons, summary judgment in favor of Tracy Brown and Tiera Brown is hereby **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary