IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

Tanesha Maretta Williams, Individually and as the Administratix of the Estate of Mariah Nevaeh Selby, Deceased, and Hughdon Lamar Selby, Individually,	)	
Plaintiffs,	)	
v.	)	C.A. No. N16C-06-098 CEB
Newark Country Club,	)	
Defendant.	)	

Submitted: July 28, 2016
Decided: November 2, 2016

ORDER DENYING MOTION TO DISMISS

On this 2nd day of November, 2016, upon consideration of Newark Country Club's ("Defendant" or "Country Club") Motion to Dismiss, and Tanesha Maretta Williams and Hughdon Lamar Selby's ("Plaintiffs") Response thereto, it appears that:

1. On June 13, 2015, Mariah Selby, age 4, was attending a graduation party with her father, Lamar Selby, at the George Wilson Center, which is adjacent to the Newark Country Club.

2. There is a well traveled path between the property of the George Wilson Center and the Country Club, along which there is an irrigation pond that is on the property of the Country Club.

3. At this point, the details surrounding Mariah Selby's death are limited but it is alleged that on June 13, 2015 she traveled along the path between the George Wilson Center and the Country Club, encountered the pond and drowned.

4. The Plaintiffs filed this lawsuit based upon the Wrongful Death Act, 10 Del. C. §3724 and the common law of Delaware. Plaintiffs claim that the Country Club knew of the danger present along the path abutting the pond and failed to take reasonable measures to provide a safe walkway. Plaintiffs claim that the Country Club owed a duty of care to those on the premises to protect them from foreseeable risks of harm and injury. Plaintiffs have added claims of willful and wanton negligence and punitive damages, arguing that a previous death at the pond put the Country Club on notice of the risk.

5. The Country Club contends that it did not owe a duty to Plaintiff because she was a trespasser on the land. Further, they argue, the pond was not an attractive nuisance as defined by the Restatement (Second) of Torts §339. Defendant also contends that there are no factual allegations in the complaint to support the legal conclusions that the Country Club acted willfully or wantonly.

6. Under Superior Court Civil Rule 12(b)(6), a case may be dismissed for failure to state a claim upon which relief can be granted. In analyzing a motion to dismiss under Rule 12(b)(6), the Court must accept all factual allegations as true and in the light most favorable to plaintiff.[1] "The test for sufficiency is a broad one, that is, whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint. If plaintiff may recover, the motion must be denied."[2]

7. Because Mariah Selby was attending a party at the George Wilson Center, it is certainly arguable that she was a trespasser on the Country Club's property when she drowned. But "Delaware sometimes treats child trespassers as business invitees, who can bring a negligence action under the doctrine of attractive nuisance."[3] This rule, set out in Restatement (Second) of Torts §339, and adopted by the Delaware Supreme Court in *Schorah v. Carey*[4], "holds that an owner can be liable for injuries to children caused by dangerous, artificial conditions on his land

[1] *L & R Saunders Assoc. d/b/a Radiology Professionals v. Bank of America*, 2012 WL 4479232 (Del. Super. Ct. Sept. 12, 2012).

[2] *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978).

[3] *Butler v. Newark Country Club*, 2005 WL 2158637, *2 (Del. Super. Ct. 2005), *aff'd*, 909 A.2d 111 (Del. 2006).

[4] *Schorah v. Carey*, 331 A.2d 383 (Del.1975).

that he should know that children, because of their age, are attracted to and unable to recognize as dangerous."[5]

8. The Country Club directs us to *Butler v. Newark Country Club*[6] decided by this Court ten years ago and affirmed by the Delaware Supreme Court. In *Butler*, summary judgment was granted to the defense in the case of an 8-year-old boy who died after falling through ice covering the very same irrigation pond at issue here. The Superior Court held that a man made pond is not an "artificial condition" for purposes of the attractive nuisance doctrine if children were "lured solely by its natural properties (its quality as a frozen pond) and not by its artificial properties (a spillway pipe)."[7] In *Butler* the child had bet his cousin he could run all the way across the frozen pond and fell through a thin patch of ice on his way back, ultimately leading to his death.[8]

9. While there is much of value to be culled from *Butler*, we think the defense is making more of it than appropriate. *Butler* does not cloak the pond – or the Country Club – with immunity until the end of time. In fact, *Butler* stated,

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[5] *Butler*, 2005 WL 2158637, at *2. *See also Id.* at *6 ("The attractive nuisance doctrine is meant only to protect children from dangers that they cannot fully and meaningfully understand, and not from dangers they choose to encounter while aware of the risks, because of reckless bravado or foolishness to a level below that of a reasonable child.").

[6] *Butler,* 2005 WL 2158637.

[7] *Id.* at *4.

[8] *Id.* at *6. ("The attractive nuisance doctrine is meant only to protect children from dangers that they cannot fully and meaningfully understand, and not from dangers they choose to encounter while aware of the risks, because of reckless bravado or foolishness to a level below that of a reasonable child.").

"Unlike many other states, Delaware has not established a hard and fast rule prohibiting recovery under the attractive nuisance doctrine if the danger involved is fire, water, or falling from a height. *Instead, each case must be considered on its particularized facts.*"[9] Without knowing the particularized facts on the day of Mariah Selby's death, this Court is unable to find to a certainty that the Plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[10]

10. It has been over 15 years since the death of the 8 year old child in *Butler* and more than 10 years since discovery was conducted in that case. We do not know how the pond presented on June 13, 2015, or whether Mariah Selby was "lured solely by its natural properties" (its quality as a pond) or by any of its "artificial properties" (such as any of its piping).[11] In granting summary judgment, the court in *Butler* took into account particularized facts such as the frozen condition of the pond, surrounding warning signage at the time of the incident, the age of the child, and whether the child was able to fully appreciate the danger the

[9] *Butler,* 2005 WL 2158637, at *6.

[10] *Klein v. Sunbeam Corp.*, 94 A.2d 385 (Del. 1952)("Thus, a complaint will not be dismissed for failure to state a claim upon which relief can be granted unless it appears to a certainty that the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.").

[11] *Butler,* 2005 WL 2158637, at *4.

body of water.[12] All of these factors, and perhaps many more, may well distinguish the *Butler* case from this one.

11. The Court finds that further factual development is needed to determine the condition of the irrigation pond on the date of the incident and the details surrounding the 4-year-old child finding her way to the pond which led to her death, as well as any other facts the parties feel important.

12. The Court is not satisfied that it can rule out plaintiffs' case at this early stage of the proceedings. The parties should conduct discovery and if so inclined, may revisit these issues upon a more complete record.

13. For the reasons stated, the Defendant's 12(b)(6) motion is DENIED.

IT IS SO ORDERED.

Judge Charles E. Butler

[12] *Butler*, 909 A.2d at 113, 114 (noting that the Newark Country Club posted "no trespassing" and "no skating" signs, stating "Unfortunately, Jeremiah chose to take the risk of walking on an ice-covered pond notwithstanding the dangers and his mother's express instruction not to do so.").