IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MEGAN E. BERNS, individually and as next friend for minor plaintiff, KYLEE R. BERNS,	:	C.A. No. 05C-07-036 WLW
Plaintiffs,	:	
v.	:	
DEBRA A. DOAN,	:	
Defendant.	:	

Submitted: October 20, 2006
Decided: December 28, 2006

ORDER

Upon Defendant's Motion for Summary Judgment.
Deferred for Further Submissions.

I. Barry Guerke Guerke, Esquire of Parkowski Guerke & Swayze, P.A., Dover, Delaware; attorneys for the Plaintiffs.

Brian T. McNelis, Esquire of Young & McNelis, Dover, Delaware; attorneys for the Defendant.

WITHAM, R.J.

Plaintiffs[1], ("the Berns") filed a negligence action against the Defendant, Debra Doan, arising out of an automobile accident that occurred on November 14, 2003. After realizing the road ahead was closed for tree removal, Ms. Berns "nosed" her vehicle into the Defendant's driveway, so that she could turn her vehicle around.[2] The exact distance that the Plaintiff drove into Ms. Doan's driveway is in dispute, but it is undisputed that Ms. Berns "nosed" her car or entered into the Defendant's driveway. Ms. Berns stopped in the Defendant's driveway and looked over her shoulder to make sure her intended path was clear, before reversing her car. Defendant Doan backed out of her own driveway, unaware of the Plaintiffs' presence, and the vehicles collided.

The Defendant filed the present Motion for Summary Judgment arguing that the premises guest statute, 25 *Del. C.* § 1501, bars Plaintiffs' cause of action against Ms. Doan, because the impact took place within the property occupied by the Defendant. Further, Ms. Doan claims that the premises guest statute bars the claim because there is no evidence that Plaintiffs were business invitees, nor is there evidence of wilful or wanton conduct on behalf of the Defendant.

Plaintiffs oppose Ms. Doan's Motion for Summary Judgment. First, the Berns argue that the General Assembly did not intend 25 *Del. C.* § 1501 to affect motor

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[1]Plaintiffs in this action are Megan E. Berns, individually and as next friend for minor plaintiff, Kylee R. Berns.

[2]Defendant Doan and her family were full time residents of a home located at 226A Center Street, Camden, Delaware 19934, which is the site of the incident in question. The house was rented to the Doans by S. Walt Sampson by lease dated January 14, 2004.

vehicle collision liability, and to impute such an intent would create an unworkable and absurd result. Second, the Berns claim that they are public invitees, sharing the same status as business invitees, because using the Defendant's driveway to turn around when the street was blocked by a fallen tree is an exercise of public right. The necessity of passage established the invitation to the public to use the property. Finally, Plaintiffs argue that there is a street right-of-way where the Plaintiff "nosed" into the driveway, so the actual impact occurred in an area reserved for public use as a thoroughfare, which makes the Plaintiffs public invitees under the premises guest statute, exempting them from its application.

Standard of Review

Summary Judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[3] The facts must be viewed in the light most favorable to the non-moving party.[4] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[5] However, when the facts permit a reasonable person to draw but one inference, the question

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[3]Superior Court Civil Rule 56(c).

[4]*Guy v. Judicial Nominating Comm'n*, 649 A.2d 777, 780 (Del. Super. 1995).

[5]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

becomes one for a decision as a matter of law.[6] When a moving party through affidavits or other admissible evidence shows that there is no genuine issue as to any material fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[7]

Discussion

Title 25 *Del. C.* § 1501, known as the premises guest statute, addresses the liability of owners or occupiers of land for injury to guests or trespassers.

> "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 owner or occupier or was caused by the wilful or wanton disregard of the rights of others."[8]

Plaintiffs point out that there is nothing within the four corners of the statute that relates to vehicular collisions, and they argue that the General Assembly did not intend the statute to affect motor vehicle collision liability due to the prior repeal of the automobile guest statute. Plaintiffs argue that the application of the premises guest statute to motor vehicle collisions would create an unworkable or absurd result. Plaintiffs' public policy argument is not persuasive.

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[6] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[7] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[8] 25 *Del. C.* § 1501.

The premises guest statute governs an occupier's liability for incidents that occur when guests without payment or trespassers enter onto an occupier's private property.[9] An absurd or unworkable result would not occur if the premises guest statute were applied to vehicular collisions like the one in question. Absent an exception, if a trespasser or guest without payment enters onto a private residential premises, they shall not have a cause of action against the occupier of the premises for any injuries or damages sustained while on the premises. The statute was intended to protect the occupier from suits by guests based on simple acts of negligence. If a vehicular collision occurs as a result of a guest without payment or trespasser entering onto an occupier's private premises in a vehicle and no exceptions apply, the occupier should not lose the protection afforded by the premises guest statute. Therefore, 25 *Del. C.* § 1501 should be construed to bar actions by a guest without payment or trespasser against the occupier of a private residential premises for vehicular collisions arising from negligence and occurring on the occupier's private premises.

A finding that Plaintiffs are public invitees, as opposed to guests without payment or trespassers, triggers a different duty owed to the invitees by the possessor of the land. A home owner or occupier owes a duty to a person that is found to be

[9]Ms. Doan was the occupier of 226A Center Street, Camden, Delaware 19934, because she rented the premises, giving her legal authority under contractual ownership. Therefore, the term occupier, as opposed to owner, will be used in the analysis of 25 *Del. C.* § 1501.

a public invitee[10] to inspect the premises and to have made it reasonably safe by repair or to have given warning of any dangerous conditions.[11] The Berns claim that they are not subject to the application of the premises guest statute, because they are public invitees, either under the Restatement (Second) definition, implied invitation through necessity or because the accident actually occurred in the street right-of-way. The Court will address Plaintiffs' argument concerning the Restatement (Second) definition first.

Restatement (Second) of Torts §332(2) defines a public invitee as a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.[12] Plaintiffs point to comment (d) in support of their position. Comment (d) states:

> "Where land is held open to the public, there is an invitation to the public to enter for the purpose for which it is held open. Any member

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[10]In determining whether the injured party is the type covered by the statute, the Supreme Court has approved of the Superior Court's applicability of the Restatement (Second) of Torts' definitions of "trespasser," "licensee" and "invitee," respectively. *Lum v. Anderson*, 2004 WL 772074, *3 (Del. Super.) citing *Caine v. New Castle County, et. al.*, 379 A.2d 1112, 1114-1115 (Del. 1977). Restatement (Second) of Torts § 343 defines the duty owed by an owner of land to a "public invitee". *Id.* at *4. Section 343 states: A possessor of land is subject to liability for physical harm caused to his [her] invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect against the danger. Restatement (Second) of Torts § 343 (1965).

[11]*Lum v. Anderson*, 2004 WL 772074, *1 (Del. Super).

[12]Restatement (Second) of Torts § 332(2) (1965).

> of the public who enters for that purpose is an invitee...
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> Thus where a strip of private land abutting upon the sidewalk is so paved that it is indistinguishable from the sidewalk, the possessor holds it open to the public as provided for public use for the purpose of passage, and anyone so using it is an invitee. The possessor's duty to use reasonable care to keep such land in proper and safe condition is not far removed from his obligation to the public upon the highway itself, or to those who stray a few feet from it in the course of travel."[13]

The Berns are not public invitees based on the Restatement (Second) definition. Ms. Doan did not invite the Plaintiffs onto her driveway, and the Defendant's driveway was not held open to the public for the purpose of turning around. The example proscribed in Comment (d) of § 332 is distinguishable from the situation in this case. There is not a public sidewalk on Ms. Doan's premises, so there is no private land abutting a sidewalk, as is the case in Comment (d). The Defendant did not hold open her driveway to the public. The driveway was for the personal use of Ms. Doan and her family only. The Plaintiffs are therefore not public invitees based on the Restatement (Second) definition.

The Plaintiffs interestingly argue that they are public invitees under implied invitation through necessity. The Berns argue that they exercised a public right when they used the Defendant's driveway to turn around, because the street was blocked by a fallen tree. Plaintiffs cite the 1851 *Campbell* case from Massachusetts in support of this position. In *Campbell*, it was held that a traveler on a highway, rendered impassable by a sudden and recent obstruction, may pass over the adjoining fields,

[13] *Id*. at Comment d.

so far as is necessary to avoid the obstruction, doing no unnecessary damage, without being guilty of a trespass.[14] In recognizing the arduous, if not more primitive, conditions of the time period, the Court noted that if this rule were not applied, not only would intercourse and business be sometimes suspended, but life itself would be endangered.[15] The Court limited the right to go upon adjacent land in the case of obstructions in the highway to inevitable necessity or unavoidable accidents and not for mere convenience.[16]

The Court has not been presented with facts concerning whether the Berns had any other possible ways to turn their vehicle around, as opposed to using the Defendant's driveway. It is not difficult to imagine there being another possibility, such as doing a three point turn in the roadway, which may negate the Plaintiffs' inevitable necessity of using Ms. Doan's driveway. In any case, the Court does not need to further inquire into whether the Plaintiffs had other options here, because the Berns' level of necessity does not rise to the level of necessity articulated in *Campbell*.

The traveler faced with an obstruction in the highway, in *Campbell*, was acquitted of a trespass charge, but the necessity of passage (onto private property) in

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[14]*Campbell v. Race*, 61 Mass. 408, 408 (Mass. 1851). It is relevant to note that this was a an action for trespass as opposed to an action asserting a claim for negligence.

[15]*Id*. at 411. The Defendant trespasser in this case was obstructed by mounds of snow in the highway.

[16]*Id*. at 413.

that case was limited to inevitable necessity or unavoidable accidents and not for mere convenience. In holding that the traveler was not guilty of trespass, the Massachusetts Court recognized that life itself could be endangered, if it held otherwise. In the case *sub judice*, the Berns are not charged with trespass. The Berns are Plaintiffs in a negligence action against the home occupier, Ms. Doan. The Berns lacked a sense of urgency, which the Massachusetts Court seemed to hinge necessity on, when they used the Defendant's driveway to turn around. The Plaintiffs' level of necessity does not sufficiently rise to a level that would make them public invitees. Ms. Doan should not therefore lose the protection afforded to her by the premises guest statute. Consequently, the Berns are not public invitees as a result of implied invitation through necessity.

Finally, Plaintiffs argue that they are public invitees, because the accident actually occurred in the street right-of-way. Plaintiffs contend that the street right-of-way, an area reserved for public use as a thoroughfare, extends 9 ½ feet beyond the paved portion of the roadway, over the Defendant's property.[17] Although, there is a factual dispute between the parties concerning where the collision actually occurred, it is important to determine the issue of how the premises guest statute is affected by the Plaintiffs' street right-of-way argument. Defendant Doan did not address this issue in her argument. Therefore, the Court will afford the parties an opportunity to further address the issue. Further briefing will be helpful to the parties and allow the

[17]Plaintiffs have submitted two affidavits in support of their calculations concerning the street right-of-way.

Court to fairly adjudicate the issue.

This Court will allow the Defendant to address this point by further submission to be filed by January 12, 2007 and Plaintiffs may respond by January 26, 2007.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution