

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

YAAKOV GENDELMAN,	)	
Individually as Surviving Father	)	
and as Personal Representative of	)	
the Estate of MAX GORDON	)	
CARLTON, Deceased,	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N11C-05-185 PLA
	)	
MICHAEL G. JUDD, M.D.,	)	
JILL JUDD, and LAURIE	)	
MERRICK,	)	
Defendants.	)	

Submitted: October 19, 2012
Decided: November 2, 2012

UPON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
DENIED

Randall E. Robbins, Esquire, ASHBY & GEDDES, Wilmington, Delaware,
Attorney for Plaintiffs.

Mary E. Sherlock, Esquire, WEBER, GALLAGHER, SIMPSON,
STAPLETON, FIRES & NEWBY LLP, Dover, Delaware, Attorney for
Defendant Laurie Merrick.

Roger D. Landon, Esquire, and Kelley M. Huff, Esquire, MURPHY &
LANDON, Wilmington, Delaware, Attorneys for Defendants Michael G.
Judd, M.D. and Jill Judd.

ABLEMAN, JUDGE

The Court has before it motions for summary judgment filed by defendants Michael G. Judd, M.D., Jill Judd, and Laurie B. Merrick. Michael and Jill Judd were custodial caregivers to their infant nephew, Max G. Carlton, at the time of his death. The issue raised in defendants' summary judgment motions is whether Max was a "guest without payment" or an "occupier" for purposes of the Premises Guest Statute. That statute prevents a guest without payment from bringing a negligence claim against the owner or occupier of residential premises for injuries sustained on the premises.¹ The statute does not explicitly bar an occupier from bringing a negligence suit against another occupier. Because Max was placed in the custody of the Judds by the Maryland Department of Social Services ("DSS"), the Court concludes that he was an occupier of their home and not a guest without payment. Therefore, the Premises Guest Statute is inapplicable, and defendants' motions for summary judgment on this basis are DENIED.

I. Factual Background

Max Carlton was born to Valerie Carlton on April 12, 2009. Shortly after his birth, the Maryland DSS received a complaint alleging that Valerie had abused another child. DSS thereupon removed Max from his mother's

¹ 25 Del. C. § 1501.

custody and placed him with a foster family. Defendants Michael and Jill Judd are the brother and sister-in-law of Valerie Carlton. Upon learning that Max was in foster care, the Judds volunteered to accept custody of him until Max's father, Yaakov Gendelman, could obtain custody. DSS transferred Max from foster care to the custody of the Judds on April 28, 2009.

On June 10, 2009, Jill Judd took Max, her three children, and co-defendant Laurie B. Merrick, the family's nanny, to the Judds' beach residence in Dewey Beach, Delaware. Max fell asleep around 8:30 p.m. Merrick agreed to take responsibility for Max during the night and moved his crib into her room. At approximately 1:30 a.m., Max woke up to eat, drank a bottle, and ultimately fell back to sleep. Merrick laid Max down in the bed next to him and she too fell asleep. Merrick awoke a few hours later and could not locate Max. She and Jill Judd began frantically searching the home for him. Tragically, Max was eventually located between the bed and the adjacent wall, where he had been unable to breathe. He was cold, white, and unresponsive. Emergency personnel were called to the home to transport Max to the hospital, but upon his arrival, he was pronounced dead from positional asphyxia.

Max's father, plaintiff Yaakov Gendelman, filed this action for wrongful death and survival claims. In the complaint, plaintiff alleges that

Merrick's negligence and carelessness resulted in Max's death. He further claims that the Judds were negligent in hiring Merrick and allowing her to care for Max on the evening of his death.

II. Parties' Contentions

The Judds filed their motion for summary judgment based on Section 1501 of Title 25 of the Delaware Code, which is commonly referred to as the "Premises Guest Statute." The Judds contend that they were occupiers of the premises and that Max was a "guest without payment." As such, they submit that the Premises Guest Statute is applicable to plaintiff's claims, which must therefore be dismissed as a matter of law. Merrick similarly filed a separate motion for summary judgment, in which she argues that she was acting as an agent of the Judds, that she owed no greater duty than her principal, and that the Premises Guest Statute precludes plaintiff's negligence claims against her as well.

After carefully considering defendants' motions for summary judgment, but before plaintiff had an opportunity to respond, the Court informed the parties that it was concerned that Max was an "occupier" and not a "guest without payment," thereby rendering the Premises Guest Statute

inapplicable.² The Court requested that defendants consider this issue, and submit supplemental argument only if they could find case law supporting the conclusion that Max was a guest without payment. Plaintiff was instructed to focus on this issue in his response to the motions, which was due after defendants' supplemental submissions.

Despite the Court's notice that it had concerns about the applicability of the Premises Guest Statute to the particular facts of this case, defendants submitted supplemental arguments in which they continued to insist that the statute applies. Both defendants presented similar arguments. They claim that an "occupier" must be able to exercise dominion and control over the property, or be permitted to freely use the property, which an infant cannot possibly do. They further assert that the Court's focus on whether Max was an occupier is improper because that inquiry is only relevant to determine whether immunity should be extended under the statute.

In his brief in opposition to the defendants' motions for summary judgment, plaintiff argues that the Premises Guest Statute does not preclude his claims against the Judds and Merrick since Max was an occupier of the Judds' home. Plaintiff also submits several alternative arguments supporting denial of summary judgment in the event that the Court finds the statute

² *Gendelman v. Judd*, C.A. No. 11C-055-185 (Del. Super. Oct. 2, 2012) (letter addressing Premises Guest Statute and relevant case law).

applicable. Plaintiff asserts, for example, that defendants' conduct amounted to "wilful or wanton" disregard, which is specifically exempted from the immunities provided by the statute. Plaintiff also raises the argument that the Gratuitous Duty Doctrine, as set forth in the Restatement (Second) of Torts at §323, precludes application of the Premises Guest Statute. Finally, he submits that a genuine issue of material fact exists regarding whether Merrick was acting as the Judds' agent. Thus, he contends that summary judgment as to her would be inappropriate at this stage regardless of the outcome of the Judds' motion.

III. Applicable Standard

Summary judgment is appropriate where the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.³ When considering a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, and the Court must draw all reasonable inferences in favor of the non-moving party.⁴

³ Super. Ct. Civ. R. 56(c); *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).

⁴ *E.g., Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

IV. Discussion

Neither party has argued that there is any genuine issue of material fact related to Max's status within the categories provided by the Premises Guest Statute -- specifically, as either a guest without payment or as an occupier. The record clearly establishes that Max was transferred to the care and custody of the Judds by the Maryland DSS at the end of April 2009. From the date the Judds obtained custody until June 10, 2009, they cared for Max in their home as a member of their family, and provided for all of his needs as if they were his natural parents. The custody order of the Maryland DSS required as much, and the Judds measured up to these expectations. The determination of whether an individual is considered an occupier is purely a question of law.⁵ In a case where the facts required to make that determination are not in dispute, it is appropriate for the Court to decide that issue on summary judgment.⁶

The Premises Guest Statute is a legislative enactment entitling landowners to a broad limitation of liability from suits by guests or

⁵ See, e.g., *Reinbold v. Rooney*, 918 A.2d 1171, 2007 WL 328787, at *2 (Del. 2007) (TABLE).

⁶ *Id.*

trespassers based on simple acts of negligence.⁷ In that regard, 25 *Del. C.* § 1501 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 owner or occupier or was caused by the wilful or wanton disregard of the rights of others.

Statutes in derogation to the common law, such as the Premises Guest Statute, must be strictly construed against the party for whose benefit the law was enacted.⁸

In this case, the Court must determine whether the Premises Guest Statute provides immunity to an owner or occupier from claims on behalf of a child who was in the custodial care of that owner or occupier, i.e., whether the child is a guest without payment or an occupier. The goal of statutory construction is to determine and give effect to legislative intent. “If a statute is not reasonably susceptible to different conclusions or interpretations, courts must apply the words as written, unless the result of such a literal application could not have been intended by the legislature.”⁹

⁷ *Stratford Apartments, Inc. v. Fleming*, 305 A.2d 624, 626 (Del. 1973).

⁸ *Id.*

⁹ *Ramirez v. Murdick*, 948 A.2d 395, 398 (Del. 2008) (quoting *Leatherbury v. Greenspun*, 939 A.2d 1284, 1289 (Del. 2007)).

In this Court's judgment, the Premises Guest Statute is not ambiguous, so that its words should be applied as written and strictly construed. The legislature enacted the statute "to protect a landowner from suits **by guests** based on simple acts of negligence[.]"¹⁰ Since the statute does not address whether an occupier of residential premises can maintain a negligence action against another occupier, the Court will not expand the Statute to apply to situations beyond those contemplated by the legislature. If the legislature had intended to deal with negligence suits between co-occupants, it could have expressly so stated. It did not and this Court is not in a position to legislate in an effort to broaden the statute's intended application.

Defendants suggest that the Court's focus upon whether Max was an occupier is irrelevant in determining whether the Statute applies.¹¹ Defendants' gloss on the literal interpretation of the statute and their efforts to expand it further could not have been intended by the legislature. If the legislature had intended to prevent one occupant from suing another occupant for negligence, it would have made that purpose clear by its

¹⁰ *Stratford*, 305 A.2d at 626 (emphasis added).

¹¹ The Judd defendants state that a plain reading of the statute indicates that the inquiry of one's legal status as an occupier only relates to the party claiming statutory immunity.

language. Since the Court must apply the words of the Statute as written, it will not interpret it in the manner defendants propose.

The parties do not disagree that defendants were occupiers of a residential property but differ on their views as to whether Max was a guest without payment or an occupier. By definition, one cannot be considered both. There appears to be no Delaware case law directly on point, most likely because the Premises Guest Statute was not intended to apply in these circumstances. The Courts have, however, had occasion to define the terms occupier and guest without payment.¹² The courts that have defined the term occupier have had to determine whether a defendant qualified for the protection afforded by the statute. Here, the Court must decide not only whether the plaintiff was an occupant, but whether the statute is even applicable at all. This distinction should not alter the analysis used to determine who is an occupier.

The Delaware Supreme Court has defined the term “occupier” as one who is in actual possession of a property.¹³ The definition includes those who are possessors, tenants, and landlords who physically control and

¹² *Reinbold*, 2007 WL 328787, at *2 (defining occupier); *Facciolo v. Facciolo*, 317 A.2d 27, 28 (Del. 1974) (defining guest without payment).

¹³ *Stratford*, 305 A.2d at 626.

exercise dominion over identifiable real interests.¹⁴ “Residency, even if temporary, combined with permissive free use of the property satisfies the definition of occupier.” Previously, the Delaware Supreme Court has held that a child, temporarily residing with a parent, qualifies as an occupier for purposes of the Premises Guest Statute.¹⁵ Defendants’ suggestion, that dominion and control are required for one to qualify as an occupier, has been expressly rejected by the Delaware Supreme Court.¹⁶

On the other hand, a guest without payment is akin to a “social guest” recognized at common law.¹⁷ The Delaware Supreme Court has defined a guest without payment as one who is present by invitation, express or implied, without economic benefit to the host.¹⁸

Max was an occupier of the Judds’ home within the meaning of the Premises Guest Statute. He was placed in the custody of the Judds by order of the Maryland DSS and the Judds’ home then became his home. The fact that his residency was temporary does not affect his status as an occupier. A

¹⁴ *Id.*

¹⁵ *See, e.g., O’Brien v. Runnels*, 1985 WL 636432, at *1 (Del. Super. Feb. 28, 1985).

¹⁶ *Reinbold*, 918 A.2d 1171 (“Dominion and control, however, is not, as [defendant] suggests, the exclusive test for determining whether someone qualifies as an occupier under the guest statute.”).

¹⁷ *Facciolo*, 317 A.2d at 28.

¹⁸ *Id.* (citing Webster’s Seventh New Collegiate Dictionary 370 (1967)).

child, residing temporarily with a parent, qualifies as an occupier for purposes of the statute.¹⁹

The facts in the case of *Dennis v. Dennis*,²⁰ upon which the defendants rely, do not persuade the Court otherwise. In *Dennis*, the court held that a child was a guest without payment while he was in his grandfather's home. That case is distinguishable, however, because the child did not reside at the premises where his injury occurred. The issue before the *Dennis* court was whether the defendant had received a benefit from the child's presence while he was visiting, but not living, in the home.

²¹ In that sense, the case is distinguishable as Max's relationship to the Judds as a child in their custody created a much different legal status.

Defendants submit that an infant cannot exercise dominion and control over property, and he thus cannot possibly qualify as an occupier. The Delaware Supreme Court has expressly rejected the use of dominion and control as the exclusive test for determining whether an individual qualifies as an occupier under the statute.²² Accepting this view would mean that all children would be considered guests without payment, which

¹⁹ See *Reinbold*, 2007 WL 328787 (defendant was an occupier after he moved into mother's home following college); See *O'Brien*, 1985 WL 636432, at *1 (child who was fifteen years old was an occupier when temporarily residing with his mother and contemplating a permanent move to the home).

²⁰ 2001 WL 112060 (Del. Super. Jan. 31, 2001).

²¹ *Id.* at *2.

²² *Reinbold*, 2007 WL 328787, at *2.

would nullify the holdings in cases such as *O'Brien* and *Reinbold*. For these reasons, Max satisfies the definition of occupier and cannot also be considered a guest without payment.

The Premises Guest Statute neither mentions nor refers to immunity provided to an occupier from negligence suits brought by another occupier. Since Max was an occupier of the Judds' home at the time of his death, the Court holds that the Premises Guest Statute is inapplicable to the circumstances of this case. Plaintiff's alternative arguments would only apply if the Court had found the Premises Guest Statute applicable, so these arguments need not be addressed herein.

V. Conclusion

For all of the foregoing reasons, defendants' motions for summary judgment based on the Premises Guest Statute are **DENIED**.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Counsel via File & Serve