2013 PA Super 261

G.W.E., INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF A.A.E., A MINOR, Appellant v. R.E.Z., JR. & T.A.Z., Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 176 MDA 2013

Appeal from the Order entered December 27, 2012,
in the Court of Common Pleas of Berks County,
Civil Division at No(s): 10-661

BEFORE: GANTMAN, J., ALLEN, J., and MUNDY, J.

DISSENTING OPINION BY MUNDY, J.: **FILED SEPTEMBER 27, 2013**

I respectfully dissent from the learned Majority's decision to affirm the trial court's order in this case. Based on my review of the record, I conclude that Appellant met the required threshold under section 339(a) of the Restatement.

As noted by the Majority, Appellant invokes section 339 of the Restatement (Second) of Torts, which states as follows.

> **§ 339 Artificial Conditions Highly Dangerous to Trespassing Children**
>
> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon 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
>
> (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
>
> (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.

Restatement (Second) of Torts § 339. The trial court resolved Appellees' motion for summary judgment on the basis that Appellants had not produced evidence in support of section 339(a).

The Majority concludes that summary judgment was properly entered because "the record establishes … that children … were not regular, or even infrequent, trespassers on Landowners' property. Thus the Landowners did not have knowledge or reason to know of such trespass to satisfy the first element of [s]ection 339." Majority Opinion at 11. It is true that evidence of prior trespasses by children could certainly be relevant to show that "possessor knows or has reason to know that children are likely to trespass." Restatement (Second) of Torts § 339(a). However, I respectfully disagree

with the Majority's conclusion that Appellant was **required** as a matter of law, to prove that children have trespassed in the past, in order to raise an issue of material fact under section 339(a). In my view, the plain text of the restatement states that Appellant need only provide evidence that "children are **likely to** trespass" on the property in question. Restatement (Second) of Torts § 339(a) (emphasis added).

Our Supreme Court first adopted section 339(a) in ***Bartleson v. Glen Alden Coal Co.***, 64 A.2d 846 (Pa. 1949). In ***Bartleson***, the plaintiff was playing near an electric tower with friends, when he climbed the tower, came into contact with electric current at about 15 feet off the ground and sustained serious injuries as a result. ***Id.*** at 523-524. The plaintiff sought liability under section 339 and prevailed in the trial court.[1] The plaintiff presented no evidence to the jury that children had previously trespassed on the land containing the tower. Our Supreme Court affirmed the judgment in plaintiff's favor, concluding specifically that section 339(a) had been satisfied by the plaintiff's evidence of children frequently being around the area near the tower.

> This case is governed squarely by these principles. The defendant knew or should have

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[1] At that time, section 339(a) was virtually the same as it is today in the restatement (second). ***See Bartleson***, ***supra*** at 525 (noting that section 339(a) required a showing that "the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass[]").

> known that children were likely to trespass upon its land. For years without objective disapproval children had played games within 20 to 400 feet of the tower; for years adults and children alike had used pathways carrying them past and within a few feet of the tower. In view of the overwhelming character of the testimony the jury could reasonably infer that the defendant coal company, through its agents, actually knew that children played in the vicinity of its tower.
>
> …
>
> The appellant argues that there was not present a necessary element of allurement[.] … This contention has been repudiated explicitly by this court. **The artificial condition causing the injury need not induce the trespass; it is sufficient that trespassing is likely to occur where a dangerous condition exists.**
>
> …
>
> Having failed to exercise ordinary care in securing the gate, it was foreseeable **that children would be attracted** to the tower innocent of its dangerous nature or under the misapprehension that the power was turned off.

Id. at 525-526 (internal quotation marks and citations omitted; emphases added).[2]

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[2] I also emphasize that comment 3 in the reporter's notes of section 339 highlights this distinction between "whether children are trespassing, or are likely to trespass." ***See*** Restatement (Second) of Torts § 339, cmt. 3. Additionally, illustration 3 under the comment for section 339(a) gives the following scenario.

> 3. The A Manufacturing Company maintains a high-tension electric wire from its powerhouse to its

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In the case *sub judice*, Appellant provided evidence that when read in the light most favorable to him, created a genuine issue of material fact for the jury regarding section 339(a). R.E.Z., Jr. acknowledged the following factors about his property and the ponds.

> Q: This pond, the first pond, is visible from the alley at the rear of your property, correct?
>
> A: Yeah.
>
> …
>
> Q: … Do you know if the waterfall or any of the sounds associated with that first pond could be heard off of your property?
>
> A: Yes.
>
> Q: Okay. How do you know this?
>
> A: It is just you can hear water run if the traffic ain't running.
>
> …
>
> Q: … Do you know if you could hear it from the neighboring property?

(Footnote Continued) ———————————

> factory. This wire is permitted to become uninsulated and to sag from the poles so that it comes into close proximity to magnolia trees, which are close to the highway at a point where there is no fence. B, a young child, climbs the tree to pick the blossoms and comes into contact with the wire which, in his eagerness to get the flowers, he does not observe. The A Company is liable to B.

Id. at cmt. (e), illustration 3. This illustration does not contain any knowledge of a prior trespass.

A: Yes.

…

Q: Have you ever been on the property where [Appellants] resided and heard your pond running?

A: Yes.

…

Q: There is a lot of residences in the vicinity of where your home is, correct?

A: Yes.

Q: I mean, it is right there almost in the middle of Robesonia?

A: Correct.

Q: And there is a lot of kids that live in the neighborhood generally?

A: It all depends. What do you mean by a lot of kids in the neighborhood?

Q: … There are children that live in the residences around your home of varying ages, correct?

A: Correct.

Q: All right. And I mean, the children come down the alley walking, on bicycles, to get to the Sunoco gas station and to get to their friends' houses, correct?

A: Correct.

Q: You have seen children walking behind your house in the alleyway at times?

A: Correct.

Q: Along the same lines, children of varying ages and adults also walk along the sidewalk there in front of your home because there are a lot of businesses in Robesonia on the main drag there.

A: Correct.

Q: Now, as far as the immediately neighboring properties, you were aware that [A.A.E.] resided in that property right next door to the west?

A: Correct.

Q: You were aware of that before this incident ever happened, correct?

A: Correct.

…

Q: You had seen [A.A.E.] playing in the backyard with her father or mother or a playmate at times after they had moved in next door to your property?

A: Yes.

Q: Were there any other children that lived on that property at 131 West Penn Avenue?

A: Yes.

Q: Okay. What other children had you seen on that property?

A: There was people in and out of there a couple of times and had some children.

…

Q: There is a row of arborvitae that goes down some length of the western edge of your property, correct?

A: Correct.

…

Q: All right. We see … there is sort of a space in that row of arborvitae. What is the story behind that?

A: There was a tree there at one time we cut down.

Q: When you say a tree, was that an arborvitae or some other type of tree?

A: It was a large maple tree.

Q: Do you know … when the maple was removed?

A: No.

Q: We have always used [Appellees' son] as a marker. Was [he] already born? Do you have any recollection how old he might have been?

A: Yes. He might have been five or six.

Q: Okay. So that's probably something that has been gone for over 15 years?

A: Yes.

Q: In these pictures, there is a white wooden chair with, it looks like, a bird feeder or a birdhouse on it, correct?

A: Um-hum. Correct.

Q: Is that your chair and your bird feeder?

A: Yes.

> Q: And you put the chair there to keep people from the neighboring property from walking onto your property correct?
>
> A: Yes.
>
> Q: All right. How long had you had in place that sort of process of having the chair there? …
>
> A: That is years.
>
> …
>
> Q: This pond would have been visible from the alleyway and the neighboring properties, correct?
>
> A: Meaning?
>
> Q: Someone on the alleyway or someone in the neighboring properties would have been able to see that pond depending upon the angle?
>
> A: Yes. But only from one side neighbor.

Deposition of R.E.Z., Jr., 8/25/10, at 23, 32, 33, 34, 35-36, 47, 48-49, 76; ***accord*** Deposition of T.A.Z., 8/25/10, at 17-21, 27-29 In addition, both Mother and Chief Heilman testified that on the day of the incident, there was an "open gap" in the arborvitaes, signaling that Appellees' chair was not there that day. ***See*** Deposition of Mother, 11/11/10, at 54; Deposition of Chief Wade Heilman, 6/8/11, at 12-13.

In my view, looking at the above evidence in the light most favorable to Appellant, there is a genuine issue of material fact as to whether Appellees "kn[ew] or ha[d] reason to know that children [we]re likely to

trespass" on this part of their property. Restatement (Second) of Torts § 339(a). It establishes that Appellees knew children passed by their property via the alleyway and the sidewalk. Appellees also knew that several children were frequently present at the neighboring property on the other side of the arborvitae. Appellees also acknowledged that the pond was visible and audible from the alleyway and from where A.A.E. resided. Finally, Appellees acknowledged that they put a chair in an open gap in the arborvitae for the purpose of keeping people out of their property. The evidence further shows that the chair was not present on the day of the incident. Based on these considerations, I conclude Appellant has raised a genuine issue of material fact as to whether Appellees, at a minimum, "ha[d] reason to know that children [we]re likely to trespass" on this part of their property." ***Id.*** As stated above, I do not believe Appellant was required under section 339(a) to prove that children have trespassed in the past.[3]

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[3] Several of our sister states have found section 339(a) of the Restatement satisfied without proof of prior trespass. ***See Yeske v. Avon Old Farms Sch., Inc.***, 470 A.2d 705, 710 (Conn. App. Ct. 1984); ***Gregory v. Johnson***, 289 S.E.2d 233, 235 (Ga. 1982); ***Mason v. City of Mt. Sterling***, 122 S.W.3d 500, 507 (Ky. 2003); ***Anderson v. Cahill***, 485 S.W.2d 76, 78 (Mo. 1972); ***Hill v. Nat'l Grid***, 11 A.3d 110, 115 (R.I. 2011); ***Hofer v. Meyer***, 295 N.W.2d 333, 336 (S.D. 1980).

The Majority cites to ***Whigham v. Pyle***, 302 A.2d 498 (Pa. Super. 1973) in support of its conclusion. ***See*** Majority Opinion at 11. However, in my view, ***Whigham*** is distinguishable as this case does not involve a 45.5 acre parcel of land. In addition, to the extent ***Whigham*** could stand for the proposition that proof of prior trespass is required under section 339(a), our

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Based on the foregoing, I conclude that the trial court abused its discretion when it granted Appellees' motion for summary judgment by requiring Appellants to prove prior incidents of trespass. As Appellant points out, Appellees' motion for summary judgment only argued that Appellants failed to satisfy section 339(a). ***See*** Appellees' Motion for Summary Judgment, 6/21/12, at ¶ 34. Because Appellees' did not argue in their motion that Appellant had not satisfied any other subsections of section 339, I would reverse the order granting Appellees' motion for summary judgment and remand for further proceedings. I respectfully dissent.

(Footnote Continued) ———————————

Supreme Court's decision in ***Bartleson*** supersedes it. ***See Bartleson***, ***supra***.