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. N10C-05-041 PLA
TRACY L. BROWN and TIERA BROWN,	)	
Defendants.	)	

ON PLAINTIFFS' MOTION TO STAY
GRANTED

Submitted: December 20, 2010
Decided: January 3, 2011

This 3rd day of January, 2011, it appears to the Court that:

1. This is the second case to arise out of the death of Plaintiffs' seven-year-old son, Damond Emory, at a pool party hosted by Defendants Tracy and Tiera Brown. Defendants held the party at a residential pool owned by family friends, Anita and Andre Urquhart. Plaintiffs filed suit in 2008 ("the 2008 action") against Tracy and Tiera Brown, the Urquharts, the Urquharts' adult daughter, and Tappitchar Bass, who was babysitting Damond on the day of his death. The Browns each filed for summary judgment in the 2008 action on the basis that Plaintiffs could not demonstrate that they breached any cognizable legal duties towards Damond. Plaintiffs' response argued in part that the Browns were *de facto*

landowners subject to the duties imposed upon premises occupiers, and that the doctrine of attractive nuisance would therefore apply against them.

2. As the Court explained in its opinion deciding the Browns' motion, Plaintiffs' reliance upon this theory of *de facto* landowner status in the 2008 action precipitated the filing of the Complaint in this case:

> Counts III and IV of the Second Amended Complaint [in the 2008 action], 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.
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> 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 [against the Browns].[1]

3. While the Browns' summary judgment motions remained under consideration, and with approximately three months to the scheduled trial date, Plaintiffs requested that this case be consolidated with the 2008 action. The Court denied the motion to consolidate, on the grounds that all discovery and dispositive

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[1] *Wilson v. Urquhart*, 2010 WL 2683031, at *10-11 (Del. Super. July 6, 2010) (footnote omitted). On September 20, 2010, Plaintiffs filed an Amended Complaint in this action removing Bass as a defendant.

motion deadlines in the 2008 action had passed, and that the Browns had not been on notice during the discovery or motion practice phases of the first-filed case that Plaintiffs intended to proceed against them on a theory of *de facto* premises owner or occupier status.[2] As the Court explained to Plaintiffs' counsel at an office conference convened to address the motion to consolidate, its decision left Plaintiffs with two options: either Plaintiffs could proceed on the first-filed 2008 action without the benefit of any attractive nuisance argument, and thereby run the risk that a final judgment in that case might bar this action, or they could dismiss the 2008 action and amend the Complaint in this case to combine all of the theories they wished to present against the Browns, which would cause them to lose the trial date established in the 2008 action.[3] Rather than dismissing the 2008 action, Plaintiffs proceeded with both cases.

4. Subsequently, the Court granted the Browns' motions for summary judgment in the 2008 action without considering the merits of Plaintiffs' *de facto* landowner theory, which it held was not properly pled against the Browns. Although the Court observed that "an amendment to the Complaint [in the 2008 action] might have offered an appropriate resolution to Plaintiffs' failure to plead at an earlier point in the litigation," it declined to permit the Plaintiffs to "inject

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[2] *Id.* at *11.

[3] *Wilson v. Urquhart*, C.A. No. 08C-08-135, at 20:6-21 (Del. Super. May 14, 2010) (TRANSCRIPT).

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."[4] Plaintiffs' appeal of this Court's decision granting summary judgment is currently pending before the Supreme Court.

5. Defendants have moved to dismiss this action on the basis that it represents a "classic attempt" to split causes of action.[5] Defendants argue that both this case and the 2008 action arise from the same underlying transaction or incident, and that there was no impediment to Plaintiffs' proceeding with all of their claims in a single case. In response, Plaintiffs note that the 2008 action remains the subject of an appeal before the Supreme Court. Plaintiffs urge that judgment in the 2008 action is not final, and that "dismissal of this case should be held in abeyance until the appeal of the first action is completed."[6]

6. While the Court may in the future be required to address Defendants' claim-splitting argument, it agrees with Plaintiffs that dismissal is inappropriate while the appeal of the 2008 action is pending. Both the Court's denial of the motion to consolidate and its conclusion that Plaintiffs did not properly plead a *de facto* landowner/attractive nuisance theory against the Browns are at issue in the

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[4] 2010 WL 2683031, at *11.

[5] Defs.' Pre-Answer Mot. to Dismiss ¶ 5.

[6] Pls.' Opp'n to Defs.' Pre-Answer Mot. to Dismiss ¶ 6.

appeal. Delaware courts have rejected Plaintiffs' argument that the appeal of a judgment renders it non-final for *res judicata* purposes.[7] Nevertheless, Plaintiffs correctly observe that "in an appropriate case, the dismissal of the second action should be held in abeyance until the appeal of the first action is completed."[8] This would certainly seem to be an "appropriate case" for a stay: a decision in Plaintiffs' favor on the pending appeal could have the effect of permitting Plaintiffs to proceed on their *de facto* landowner theory without raising *res judicata* issues, while an affirmance on appeal would likely clarify and simplify Defendants' claim-splitting argument.

7. Therefore, Plaintiffs' Motion for a Stay is **GRANTED**, and this case is stayed pending the outcome of the appeal before the Supreme Court in the first-filed action, *Wilson v. Urquhart*, C.A. No. 08C-08-135. Accordingly, a decision on Defendants' Motion to Dismiss will be held in abeyance.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Arthur D. Kuhl, Esq.
Beverly L. Bove, Esq.
Vincent J.X. Hedrick, II, Esq.

[7] *See, e.g.*, *Maldonado v. Flynn*, 417 A.2d 378, 384 (Del. Ch. 1980).

[8] *Id.*