IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

STUART and CINDY MCBRIDE, Guardians of NANCY MCBRIDE, an unmarried minor,	)	
Plaintiffs,	)	
VS.	)	No. 00-1302
SAMMY SHUTT, ET AL.,	)	
Defendants.	)	

ORDER ON PENDING MOTIONS FOR SUMMARY JUDGMENT

This is a personal injury action filed by the plaintiffs, Stuart McBride and Cindy McBride, on behalf of their minor child, Nancy McBride. The defendants are W&N Properties, LLC, William Warren Bond, II, Robert Murray Wood, III and his wife Jona Wood, Sammy Shutt, Robert E. Shutt and Mary Jane Rainwater. Defendants are the developer and owners of various interests in the property upon which Nancy McBride was injured on July 27, 1999, allegedly due to the defendants' negligence.[1] Before the Court are two motions for summary judgment. The first motion was filed on behalf of Sammy Shutt, Robert E. Shutt and Mary Jane Rainwater. The second motion also was filed on behalf of

[1] Plaintiffs also named as a defendant Randall Baugus d/b/a Randall Baugus Realty. However, on April 2, 2002, the Court entered an order granting summary judgment to Baugus after plaintiffs conceded that summary judgment was appropriate.

Sammy Shutt, as well as William Warren Bond, II, Robert Murray Wood, III, Jona Wood and W&N Properties. The plaintiffs have responded to both motions.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Celotex Corp., 477 U.S. at 323.

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). However, the court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. Id. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street v. J.C. Bradford & Co.,

886 F.2d 1472, 1479 (6th Cir. 1989) (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

The evidence in the record shows that, in 1999, W&N Properties had built three townhouses, designated as units 6, 7, and 8, on Pickwick Lake in Tennessee. The development was known as the Boardwalk at Northshore, and additional townhouses were planned for the site. In March 1999, W&N sold various partial interests in the entire Boardwalk development to William Warren Bond, II, Robert Murray Wood, III and Jona Wood, and Sammy Shutt and his wife, Cathy Shutt (with W&N, the "Boardwalk owners"). The individual townhouse designated as unit 7 was then sold to Sammy Shutt, Robert E. Shutt and Mary Jane Rainwater as co-tenants on July 7, 1999. Unit 8 was sold to another individual. At the time of the accident, unit 6 had not been sold so that it, as well as the common areas of the development, were owned by the Boardwalk owners. The evidence is unclear as to whether the owners of the individual townhouses also had an ownership interest in the common areas.

From the public street, there is a circular driveway to the Boardwalk which runs down a steep hill to a flat parking area in front of the townhouses, then up an equally steep slope in the other direction, back to the street. The townhouses are at the rear of the parking lot, overlooking the water. Since there were only three townhouses built in July 1999, a portion of the parking lot was still open to the lake, unobstructed by townhouses. There was a bare,

vertical retaining wall at the edge of the parking lot with concrete pilings on which the other townhouses would be built. The drop from the retaining wall was steep, and there was no barrier that would stop someone from falling over the edge. There was a curb approximately six inches high, as well as several metal posts approximately two feet high and spaced several feet apart.

For her family's vacation, Cindy McBride leased the townhouse designated as unit 7 for a period of thirteen nights, to begin on July 26, 1999. The lease agreement was entered into between Cindy McBride and Sammy Shutt, as representative of himself and his co-tenants. Stuart and Cindy McBride arrived at the Boardwalk on July 26 with several members of their immediate and extended family, including their daughter Nancy, who was then eight years of age. Although they had brought bicycles with them, upon their arrival at the Boardwalk Cindy and Stuart McBride noticed the steepness of the drive and the danger of the open retaining wall, and realized that it would be unsafe to ride the bicycles. Nevertheless, the bicycles were unloaded. Nancy was warned to stay away from the edge of the retaining wall, but was not specifically told that she could not ride her bicycle.

On the morning of July 27, 1999, Nancy McBride walked a bicycle up the entrance drive to the top of the hill, and then rode the bicycle down the steep exit slope. She was unable to stop or turn the bicycle when she reached the parking lot, hit the six-inch curb at the edge of the retaining wall and was catapulted over, onto the ground below, suffering severe injuries.

In the motion for summary judgment filed on behalf of Sammy Shutt, Robert E. Shutt and Mary Jane Rainwater, the defendants first assert that any claims asserted by Cindy and Stuart McBride on behalf of themselves, as opposed to those asserted on behalf of their daughter, are barred by the one-year statute of limitations applicable to personal injury actions in Tennessee. See Tenn. Code Ann. § 28-3-104(a)(1). The plaintiffs concede this point, stating that they are asserting no claims on their own behalf, only claims on behalf of their minor daughter. Pursuant to Tenn. Code Ann. § 28-1-106, statutes of limitation for the claims of a minor are tolled until the person reaches the age of majority. Therefore, any claims that are properly brought on behalf of Nancy McBride are timely.

In order to establish negligence, the plaintiffs must show five elements: (1) a duty of care owed by defendant to plaintiffs; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause. See McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995); McClenahan v. Cooley, 806 S.W.2d 767, 774 (Tenn. 1991); Dixon v. Atlantic Soft Drink Co., 980 S.W.2d 200, 201-02 (Tenn. Ct. App. 1998). Duty has been defined as "the legal obligation owed by defendant to plaintiff to conform to a reasonable person standard of care for the protection against unreasonable risks of harm." McCall, 913 S.W.2d at 153. The existence of a duty is a question of law to be decided by the Court. See Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000); Lett v. Collis Foods, Inc., 60 S.W.3d 95, 98 (Tenn. Ct. App. 2001).

Defendants Robert E. Shutt and Mary Jane Rainwater assert that they were owners only of unit 7 of the Boardwalk, not of any portion of the common area where the accident occurred. Therefore, these defendants maintain that they had no control over that portion of the property and owed no duty of care to Nancy McBride. In addition, these defendants contend that there was, at the time of the accident, a separate entity known as the Boardwalk at Northshore Homeowners' Association, which was solely responsible for the maintenance of the common areas.

The evidence in the record at this time does not support the conclusion that Robert E. Shutt and Mary Jane Rainwater owed no duty of care to Nancy McBride. There is some evidence, although it is not strong, that the owners of the individual townhouses had an ownership interest in the common areas of the Boardwalk property. In addition, the evidence as to the existence of the Homeowners' Association is, at this time, disputed. Greg Wilson, a member of W&N, testified in his deposition that he believed the Association was in existence prior to the date of the accident, and the only copy of the bylaws in the record is dated May 25, 1999. However, plaintiffs have submitted documents obtained from the Tennessee Secretary of State's Office showing the date of the Association's charter and formation as February 1, 2000.

The defendants contend that they could not have reasonably foreseen that Nancy McBride would ride her bicycle down the hill, nor foresee the consequences of her actions. Therefore, it is argued that they owed Nancy McBride no duty of care. The defendants rely

heavily upon their characterization of the danger as open and obvious, regardless of whether those exact words are used. However, the Tennessee Supreme Court, in Coln v. City of Savannah, 966 S.W.2d 34 (Tenn. 1998), limited the application of the open and obvious doctrine and endorsed a balancing approach to the question of duty. The Court stated:

> Whether the danger was known and appreciated by the plaintiff, whether the risk was obvious to a person exercising reasonable perception, intelligence, and judgment, and whether there was some other reason for the defendant to foresee the harm, are all relevant considerations that provide more balance and insight to the analysis than merely labeling a particular risk "open and obvious." In sum, the analysis recognizes that a risk of harm may be foreseeable and unreasonable, thereby imposing a duty on a defendant, despite its potentially open and obvious nature.

Id. at 42. Therefore, the fact "[t]hat a danger to the plaintiff was 'open or obvious' does not, *ipso facto*, relieve a defendant of a duty of care." Id. at 43. A risk is unreasonable, and there is a duty to act with reasonable care, "if the foreseeability and gravity of harm posed from a defendant's conduct, even if 'open and obvious,' outweighed the burden on the defendant to engage in alternative conduct to avoid the harm . . . ." Id.; see also McCall, 913 S.W.2d at 153.

The factors that the Court should consider in determining whether a risk is unreasonable include:

> the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance of social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct.

Staples, 15 S.W.3d at 89; see also Coln, 966 S.W.2d at 39; McCall, 913 S.W.2d at 153.

The defendants argue merely that no one, not even Cindy and Stuart McBride, could have foreseen that after being warned not to go near the edge of the retaining wall, Nancy McBride would, alone and unsupervised, ride a bicycle down the steep slope and over the edge. However, this argument does not appear to take into account the fact that Nancy was only eight years old, and that it was clearly foreseeable that children of all ages might be playing on the premises.[2] Furthermore, the magnitude of the harm involved in falling over the edge of the retaining wall is great.

Defendants engage in a great deal of speculation regarding whether the existence of a barrier would have succeeded in preventing Nancy McBride's injuries, or might perhaps even have increased her injuries. However, this is merely conjecture. On this record, and in the absence of any evidence to the contrary, it appears reasonable to believe that some type of safety measure, barrier or otherwise, could have prevented or lessened the harm to Nancy McBride, and was feasible at the time of the accident.

The Court cannot say, as a matter of law on the evidence in the record at this time, that the defendants owed no duty of care to Nancy McBride. Therefore, summary judgment on this issue is not appropriate.

Stuart and Cindy McBride, as Nancy McBride's parents, have the legal duty to

[2] Defendants state in their memorandum that "Cindy McBride did not anticipate that her daughter, or any other occupants of the townhouse, would be playing in the parking lot area in front of the townhouses." Even if this is true, it has little or no bearing on the question of the defendants' duty. Clearly, for a development such as the Boardwalk, it is foreseeable that there might be children playing in various areas of the property.

provide for the care and protection of their daughter. Therefore, they are legally liable for the payment of Nancy's necessary medical expenses. Accordingly, the defendants assert that a derivative claim for Nancy's medical expenses belonged solely to Stuart and Cindy McBride, and should have been asserted on their own behalf within the applicable one-year statute of limitations. It is argued that Stuart and Cindy McBride cannot shift the liability for those medical expenses to their daughter by asserting such a claim on the child's behalf.

Defendants' position is the general rule under Tennessee law. In Foster v. Adcock, 30 S.W.2d 239 (Tenn. 1930), the Court refused to allow a child's medical expenses to be paid out of the child's recovery from a tortfeasor, stating that payment of those necessary expenses was the parent's obligation. Id. at 240. Thus, when a child is injured by a tortfeasor, the parents have a derivative cause of action for the loss of services and medical expenses resulting from the injury, which is separate and distinct from the cause of action for the injuries to the child. See Dudley v. Phillips, 405 S.W.2d 468 (Tenn. 1966); Boring v. Miller, 386 S.W.2d 521, 523 (Tenn. 1965); Rogers v. Donelson-Hermitage Chamber of Commerce, 807 S.W.2d 242, 247 (Tenn. Ct. App. 1990). See also Luther, Anderson, Cleary & Ruth, P.C. v. State Farm Mut. Auto. Ins. Co., 1996 WL 198233, *3-4 (Tenn. Ct. App. Apr. 25, 1996) (stating that a portion of a settlement agreement designated as being for minor's medical expenses was an element of the father's recovery); McGrath v. Mitchell, 1989 WL 57732, *3 (Tenn. Ct. App. June 1, 1989).

Citing cases from various other jurisdictions, plaintiffs argue that it is the trend in the

United States to allow the parents of an injured child to assert all claims arising out of the injury, including a claim for the child's medical expenses, in a single action brought on behalf of the child. Plaintiffs also contend that the Tennessee Supreme Court has recognized that this could be appropriate, citing Wolfe v. Vaughn, 152 S.W.2d 631 (Tenn. 1941).

In Wolfe, the Tennessee Supreme Court quoted a passage from the legal encyclopedia Corpus Juris, to the effect that the parents of an injured child may waive their right to recover in a derivative action, and bring one action on behalf of the child to recover both medical expenses and damages for the child's injury. Id. at 633-34. However, the circumstances in Wolfe were far different from those in this case. The mother of the injured child in Wolfe had died a few days before the accident, the child's father was "non compos" or "civilly dead," and no one had assumed liability for her medical expenses. Thus, if the child could not sue for the expenses, there was no one who could do so. Id. at 633. In those unique circumstances the Court stated, "we think that in a case of this character where a child has no parent who can sue for such expenses that she can sue for and recover the same." Id. at 634.

This Court has been unable to locate any Tennessee cases holding that when a child is living with and being fully supported by her parents, the parents may assert a claim against the tortfeasor on behalf of the child for her own medical expenses. In the absence of any such authority, the Court declines to adopt the position urged by the plaintiffs. Therefore, the Court concludes that the claim purportedly brought on behalf of Nancy McBride for

medical and medically-related expenses is properly designated as the claim of Cindy and Stuart McBride. As such, the claim is barred by the applicable one-year statute of limitations.

Defendants also assert that the plaintiffs have failed to produce evidence that they acted with the recklessness necessary to support an award of punitive damages. In Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992), the Tennessee Supreme Court restricted "the awarding of punitive damages to cases involving only the most egregious of wrongs," stating that such damages should serve as a "deterrent of truly reprehensible conduct." Id. at 901 (citation omitted). The Court went on to hold that punitive damages may only be awarded if the plaintiff can prove, by clear and convincing evidence, that a defendant acted intentionally, fraudulently, maliciously, or recklessly. Id.

The Court in Hodges stated that "[a] person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." Id. In this case, plaintiffs argue that because this was an open and obvious danger, the defendants' failure to take steps to alleviate that danger constitutes recklessness. However, punitive damages are not warranted just because a danger is open and obvious.[3] An award of punitive damages must be focused on the conduct of the defendants. While there is evidence that the defendants in this case realized

[3] The fact that a danger is open and obvious can cut both ways since by definition, such dangers generally are open and obvious to all, not to the defendant alone.

there was a danger, there is nothing in the record showing that the failure to take safety precautions amounted to a gross deviation from the standard of care rather than a merely negligent deviation. Therefore, the Court finds that summary judgment is appropriate on the claim for punitive damages.

Although plaintiffs have asserted a claim for attorney's fees, they now concede that under Tennessee law, attorney's fees generally cannot be recovered absent a contractual or statutory basis for such recovery. See State *ex rel.* Orr v. Thomas, 585 S.W.2d 606, 607 (Tenn. 1979); Kimbrough v. Union Planters Nat'l Bank, 764 S.W.2d 203, 205 (Tenn. Ct. App. 1989). Therefore, summary judgment is also appropriate on the claim for attorney's fees.

In conclusion, the Court hereby GRANTS summary judgment to the defendants on the claim for Nancy McBride's medical and medically-related expenses, as that claim belongs to her parents and is barred by the statute of limitations. The Court also GRANTS summary judgment on the plaintiffs' claims for punitive damages and attorney's fees. The motions for summary judgment are DENIED in all other respects.

IT IS SO ORDERED.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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DATE