CHILDREN BEWARE OF ATTRACTIVE NUISANCES

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In ordinary conversation, the "attractive nuisance" legal doctrine is often used to describe conditions which are just the opposite of what the law considers an attractive nuisance. Often we hear references to any condition that would attract children as an attractive nuisance subjecting the property owner to liability if the child is injured. But a recent case from the Ohio Court of Appeals held to the contrary, namely that a condition, such as a lake or pool, that a child would sense as possibly dangerous is not an attractive nuisance at all.

In that recent case, the Ohio Court of Appeals held that the property owner had no liability as a matter of law in the drowning death of a 12-year-old boy. By contrast, in a fairly recent Kentucky case involving the drowning death of a 9-year-old boy, the Kentucky Supreme Court held that the attractive nuisance doctrine would allow the jury to render a damages award. These two cases taken together provide a clear understanding of how the courts in Ohio and Kentucky apply the attractive nuisance doctrine. Courts in both states do not allow recovery based on the attractive nuisance doctrine where a child aged 14 years or younger would know, or should know, that he or she may be harmed by a condition he or she is attracted to.

In *Mayle v. McDonald Steel Corporation*, decided on October 7, 2011, the private landowner (McDonald Steel) was granted summary judgment, which the Court of Appeals affirmed, although there was evidence that McDonald knew or should have known that children occasionally swam in the reservoir on its property. In this case,

three young boys dove off an abutting concrete wall into the reservoir. One of them was pulled by heavy currents below the surface and drowned. Based on deposition testimony from various lay and expert witnesses, the Court of Appeals held that any child would appreciate the danger posed by diving off a high wall (15 feet) into a body of water that had "frothy water" next to the wall. The particular risk in this case was the strong undertow created by the wall damming the flow of the water. Although the undertow itself was not plainly visible, the overall dangerous condition was "open and obvious" even to a child. Citing earlier Ohio cases, as well as cases from Illinois and Pennsylvania, the Court of Appeals held that the trial court had properly dismissed the claim without submitting the case to the jury.

By contrast, in *Mason v. City of Mt. Sterling*, decided on January 22, 2004, the Kentucky Supreme Court held that the attractive nuisance doctrine ***did apply*** where the dangerous condition was not apparent on the surface of waters that had flooded an area adjacent to the parking lot of an apartment complex. In that case, a 9-year-old boy who had come from a nearby apartment to see cars "floating" in the flooded parking lot, "stepped over a submerged culvert entrance (storm drain or headwall) which was covered by opaque muddy water. A strong undertow sucked J.C. down into the storm sewer system." The Supreme Court held that the attractive nuisance doctrine was applicable because the dangerous condition was not "open and obvious." In contrast to the "frothy water" in *Mayle*, which signaled danger below even to a youth, the muddy water in *Mason* concealed the danger.

Both the Ohio and Kentucky cases recognized the same elements for an attractive nuisance case. The owner of land is liable for an artificial condition on his property, even to trespassing children, if the following conditions are met. First, the owner has

reason to know that children are likely to trespass. Secondly, the condition involves an unreasonable risk of harm to children. Third, the children do not, or should not, appreciate the risk. Fourth, it is not unreasonably burdensome to the owner to eliminate the risk. And finally, the owner does not take reasonable means to eliminate the danger or otherwise protect the children. In *Mayle,* the 12-year-old boy encountered an open and obvious risk that any child would appreciate. And there was testimony that he in fact knew the risk of diving from the wall into the reservoir. In *Mason,* there was sufficient evidence to take the case to the jury that the City and two private property owners had prior knowledge of common flooding in the area, where there were many nearby children, but they took no reasonable means to remedy the inadequate drainage system inlet pipe on their property. The attractive nuisance doctrine was held to be applicable in *Mason,* but not in *Mayle.*

Obviously children are attracted to water, whether in a swimming pool or any confined condition. However, it is only in rare circumstances, where the hazard posed by the water is somehow hidden, that the attractive nuisance doctrine will permit recovery in Kentucky or Ohio. And in fact most every state recognizes the “open and obvious” exception to the attractive nuisance doctrine.