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SWIMMING POOL NOT "ATTRACTIVE NUISANCE" IN TEEN TRESPASSER DIVING INJURY

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There is a popular misconception that landowners will be liable for maintaining an "attractive nuisance" when a teenage trespasser drowns or is seriously injured after gaining access to a closed swimming pool. As illustrated by the *Glover* opinion described below, the attractive nuisance doctrine is not generally applicable to teenage trespassers. Further, a swimming pool does not ordinarily present the type of latent danger or "trap" situation which would impose landowner liability for a trespasser injury on the premises. In such situations, the landowner has no legal duty to make the premises "trespasser proof." Rather, any legal duty owed pursuant to the attractive nuisance doctrine would be satisfied by simply securing the premises to a degree which sufficiently denies access to child trespassers of "tender years." Within this context, "tender years" usually refers to child trespassers seven years of age or under. The six foot high padlocked fence surrounding the swimming pool in *Glover* would certainly fulfill this requirement to avoid liability under the attractive nuisance doctrine.

New Kids in the Pool Break Dance

In the case of *Glover v. Oakwood Terrace Associated II Ltd.*, 816 S.W.2d 43 (Tenn.App. 1991), plaintiff Bonita Glover brought a personal injury lawsuit on behalf of her minor son, Edward Barnes, following an incident in an apartment complex swimming pool of defendant Oakwood Terrace Associated II Ltd. The facts of the case were as follows:

> [Edward Barnes was] an admitted trespasser at a closed swimming pool at Oakwood Terrace Apartments in Chattanooga on May 15, 1988. Barnes, who was sixteen years and eleven months old on that date, was paralyzed when he apparently struck his head on the bottom of the pool while diving...
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> The pool was rectangular and measured approximately forty by twenty-five feet. Its depth ranged from three feet to six feet. It had no diving board and was not designed for diving. On the date of the accident, two signs were posted in the pool area. On these signs were printed:
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> > Warning - No lifeguard on duty. Children under 14 should not use pool without an adult in attendance.

Printed on another sign were the "Pool Rules", two of which were:

> 1. All persons using pool do so at own risk - Owners and management not responsible for accidents or injuries.
> 2. Pool is for tenants' use. . . . Others with management permission only.
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> There was no "No Diving" sign in the pool area, which was completely enclosed with a six foot high chain link fence with a gate. On May 15, 1988, the date of the accident, the pool was closed and the gate was padlocked.

Edward Barnes would have been seventeen years of age eighteen days after the accident. He had learned to swim when he was between two and four years old, and thereafter swam on a regular basis. In 1987, he went swimming about twenty times in local community pools in the Chattanooga area. These pools had diving boards, and he regularly dived and jumped off them. He had hit his chest on the bottom of pools on at least two occasions when he was diving.

Barnes had his driver's license, and his mother bought a car for his use and entrusted it to him. He had worked in a restaurant, was a good athlete, was in the tenth grade at school and a poor student. His "mental age" was said to be twelve to fourteen years.

Young Barnes arrived at the pool on May 15 between 12:00 noon and 1:00 p.m., with two friends, Ginika McKinney and Sylvester Pryor. None of the three was a tenant at the apartment complex and none had an invitation to swim in the pool. Although the pool was closed and the gate was padlocked when they arrived, there were several people inside the fence in the pool area, some of whom had climbed over the fence while others had pulled up the fence and crawled under it.

Barnes and his two friends then proceeded to climb over the fence where it joined a retaining wall. After entering the pool, he swam, jumped, and played for three or four hours, during which he was in both the deep and shallow ends of the pool. He dived into both ends of the pool on several occasions and swam from one end of the pool to the other. When he dived he held his hands out in front of him so his face would not hit the bottom. On his last dive into the pool at approximately 4:00 p.m. he apparently struck his head on the bottom and fractured two of the vertebrae in his neck which rendered him a quadriplegic. The testimony was conflicting as to the location of the last dive. One witness said he dived off the deep end while other said the shallow end. Barnes did not recall what happened, owing to his injury.

Velia Foster and her 14 year old daughter, Katherlyn, had an apartment located over the pool area at the apartment complex. She testified that children frequently swam in the pool, and that the apartment manager had told her that "unauthorized kids were playing in the pool."

On the day of the accident, even though the pool gate was locked, the pool area was crowded. Velia Foster's daughter and two of her nieces entered the pool area by stepping up on the retaining wall and going through an opening between the wall and the fence. Edward Barnes and his friends entered the pool area the same way. Teenage children from the surrounding neighborhood were continuously coming into the pool area but the management took no action to block the entrance at the wall.

On that day, Katherlyn saw Edward Barnes dive into the pool at the deep end. He did not appear to be frolicking. They were never ordered to leave the area.

The jury returned verdicts of $ 300,000.00 for Barnes and $ 100,000.00 for Glover. The trial court entered judgment on the verdict. In so doing, the trial court denied Oakwood's motions to either overturn the verdict or order a new trial. Oakwood appealed.

Based upon the following testimony, Barnes maintained on appeal that "sufficient evidence was presented that the pool was a trap, justifying a verdict for the plaintiffs."

> An expert for the plaintiffs testified that "there's a ridge runs across where the lifeline was about three or four inches inside the lifeline when I dove down and swam around on the pool. It comes up approximately an inch in my estimation". He also testified that the depth markers were misleading because the water's depth, on the day he gauged it, was only five feet, nine inches.

As defined by the appeals court, a "trap" within this context is "any hidden, dangerous condition which a person who does not know the premises could not avoid by reasonable care and skill". Applying this definition to the facts of the case, the appeals court found no evidence that the pool in question was a trap.

> We need not belabor the point. In our view this swimming pool did not constitute a trap - even for the unwary - much less for an experienced swimmer who had been in the pool for about four hours. It is not disputed that the water was clear, the depth marked, the pool was free of foreign objects, was surrounded by a fence six-feet high, the gate was padlocked, and that young Barnes trespassed for three or four hours before his diving accident.

Despite "various references to a trap" in the jury instructions, the appeals court found this case "was allowed to go to the jury on the attractive nuisance theory." As described by the appeals court, Section 339 of the Restatement (2d of Torts sets out "the elements of the doctrine of Attractive Nuisance" as follows:

> (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
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> (b) the condition is one 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 injury to such children, and
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> (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
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> (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
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> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Further, the appeals court noted that commentary to Section 339 of the Restatement provides the following age parameters and rationale for the attractive nuisance doctrine:

> In the great majority of the cases in which the rule here stated has been applied, the plaintiff has been a child of not more than twelve years of age. As the age of the child increases, conditions become fewer for which there can be recovery under this rule, until at some intermediate point, probably beyond the age of sixteen, there are no longer any such conditions... [Regarding] the realization of the risk by a child... the doctrine does not extend to those conditions the existence of which is obvious, even to children, and the risk of which should be fully realized by them...

> The purpose of the duty is to protect children from dangers which they do not appreciate and not to protect them against harm resulting from their own immature recklessness in the case of known and appreciated danger. Therefore, even though the condition is one which the possessor should realize to be such that young children are unlikely to realize the full extent of the danger of meddling with it or encountering it the possessor is not subject to liability to a child who in fact discovers the condition and appreciates the full risk involved, but nonetheless chooses to encounter it out of recklessness or bravado.

In particular, the appeals court acknowledged that "a swimming pool in a good state of repair... is not per se [i.e., in and of itself] an attractive nuisance." On the contrary, the appeals court stated that "a body of water is not an 'attractive nuisance' unless there is some unusual or hidden danger in it."

> [A]bsent evidence of an unusual or hidden danger - a danger other than that incident to all bodies of water - a landowner will not be held liable for the death of a trespassing child by drowning in a pond or other body of water maintained on his premises.

Applying these principles to the facts of the case, the appeals court found sufficient "evidence from which a jury could conclude that defendant knew or should have known of the presence of trespassing children." Despite such knowledge of trespassing children on the premises, the appeals court found "no evidence in the record from which a jury could conclude that any of the remaining elements of the 'doctrine of attractive nuisance' are present."

> Specifically, the element of unreasonable risk of death or serious bodily harm is not present because the pool in this case is an ordinary [pool]... and there is no evidence that it is characterized by any unusual or hidden danger... [A]bsent evidence of an unusual or hidden danger - a danger other than that instant to all bodies of water - a landowner will not be held liable for the death [or serious bodily injury of a trespassing child... in a pond or other body of water maintained on his premises.
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> Evidence of the third element of the "Attractive Nuisance Doctrine" - the inability of children, because of their youth, to discover or comprehend the risk involve - is also absent in this case. It is well established that the "Attractive Nuisance Doctrine" does not apply to situations in which the condition causing the harm is one involving a common and obvious danger.
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> Finally, the fourth element of "attractive nuisance" requires a comparison of the utility of maintaining the condition, and the burden of eliminating any danger, with the risk of harming trespassing children... In view of the fact that the risk... is slight, there being no unusual or hidden danger present, we think that it would be an unreasonable burden to require defendant to maintain a full-time guard or to erect and maintain a fence which would effectively prevent the trespass of children.

In the opinion of the appeals court, "the fact that Barnes was not fully developed mentally, since his 'mental age', was between 13 and 14 years" had no effect on the applicability of the attractive nuisance doctrine in this instance.

> Barnes' expert conceded that a 13-year old boy should appreciate the danger of diving into a pool of water. There is no authority... for the proposition that liability under the

> Attractive Nuisance Doctrine can be imposed upon defendants because the plaintiff has not developed intellectually as rapidly as other seventeen year olds.

Having found no evidence to support the jury verdict, the appeals court found that Oakwood's motion for judgment notwithstanding the verdict should have been granted by the trial court. (A trial court should grant defendant's motion for judgment notwithstanding a jury verdict for plaintiff where all the evidence, viewed in a light most favorable to support the verdict for plaintiff, still fails to satisfy the minimal requirements of the law to impose liability.) The appeals court, therefore, reversed the judgment of the trial court and dismissed the case.