IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STEPHANIE L. BUTLER, individually and as Administrix of the Estate of Jeremiah Butler and as Next Friend of her minor daughters **TIARA BULTER** and **ANAISHA BUTLER,**	)	
Plaintiffs,	)	
v.	)	C.A. No. 02C-11-072-PLA
NEWARK COUNTRY CLUB, INC.	)	
Defendant.	)	

Submitted: August 23, 2005
Decided: August 29, 2005

UPON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
GRANTED

Joseph J. Rhoades, Esquire, Wilmington, Delaware, and Kester I. H. Crosse, Esquire, Williams & Crosse, Wilmington, Delaware, Attorneys for Plaintiff.

Danielle K. Yearick, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware, and Mason E. Turner, Esquire, Prickett, Jones, & Elliot, Wilmington, Delaware, Attorneys for Defendant.

ABLEMAN, JUDGE

An eight-year-old child tragically died as a result of a fall through ice covering an irrigation pond. The pond was located on a golf course belonging to a country club. The child was a trespasser. In this action for negligence, the defendant landowner owed no duty to protect the child from the pond because it (1) was not an artificial condition within the meaning of the attractive nuisance doctrine, and (2) was an "open and obvious danger" that any child old enough to be allowed outside on his own must recognize and guard against. Summary Judgment for the landowner is therefore **GRANTED**.

Facts

On January 20, 2001, Jeremiah Butler ("Jeremiah") left his Newark home to play at a local community center with his sister, Tiara Butler ("Tiara"), and his cousin, Evon McDuffy ("Evon" with Jeremiah and Tiara "the Children"). Jeremiah was eight years old at the time; Tiara was eleven, and Evon was thirteen. Before they left, Stephanie Butler, Jeremiah and Tiara's mother, specifically warned the three not to play in the ponds that are adjacent to the community center property, and the Children seemed to understand her.

The Wilson Community Center in Newark, Delaware neighbors a golf course owned and operated by Defendant Newark Country Club. The golf course contains numerous ponds and streams to serve as "hazards" for its players. The water for these hazards is stored in a one million gallon irrigation pond adjacent to

a stream called Boggy Run. The irrigation pond is structured to take a continuous flow of water from Boggy Run through a large pipe, and to continually return excess water, presumably so that it will never become stagnant. Underground pipes connect the irrigation pond to the water hazards on the course so that they can be refilled as needed. The record indicates that the irrigation pond sits near the 18th fairway, and may also serve as a water trap for the defendant's customers.

On the day in question, the Children climbed over or through a split-rail wooden fence separating the Defendant's property from the community center. They also ignored the several "no trespassing" signs posted along that fence, allegedly because they did not know what "trespassing" meant. The Children also ignored a "no skating" sign that the Defendant had placed between the irrigation pond and the community center.

The parties disagree on the exact sequence of events that led to Jeremiah's fall and ultimate death. It is agreed that both Evon and Tiara tested the ice by stomping on it before they began playing on the pond, and admitted that they understood the danger that the ice could break underneath them – the reason for the test. The Plaintiffs then argue that Jeremiah followed the older children onto the ice on his own. The record suggests, however, that Jeremiah entered the irrigation

pond because he bet Evon that he could run all the way across it[1], even though most of the ice was untested and there was a hole at one end of the pond. [2] Jeremiah did make it all the way across the pond, but, while returning, trod the ice covering the inflow from Boggy Run. The motion of the water at that point apparently caused that ice to be thinner, and it collapsed. Jeremiah was trapped under the ice for approximately forty-five minutes before being rescued. He suffered grievous injury from hypothermia and lack of oxygen, and died a month later.

In the year 2000, Defendant expanded the irrigation pond from a half million to a million gallon capacity, and replaced a dilapidated dam with the intake pipe. The work was not contracted, but was accomplished entirely by defendant's employees. There is some evidence that, prior to this expansion, Defendant had surrounded the irrigation pond with chain link fence. After the expansion, the defendant allegedly switched to the split rail fence and the no trespassing / skating signs that were present at the time of the accident.

[1] Def. Op. Br. on Def. Mot. For Summ. J., Ex. B, Dep. Of Tiara Butler (hereinafter "Tiara at _") at 28 ("Q: When you went down to the pond the second time, did Evon make a bet with Jeremiah? A: Yes. Q: What did he say? A: He said, 'Border, I bet you can't cross the whole thing.' Q: And that was his nickname for Jeremiah? A: Yes. Q: And what did Jeremiah say? A: He said, 'I bet you I can.'").

Standard of Review

The standard for considering summary judgment motions pursuant to Superior Court Civil Rule 56 is, considering all facts in a light most favorable to the non-moving party, whether there is a genuine dispute of material fact that requires a trial.[3]

Discussion

The Complaint offers but one ground for relief – negligence. Specifically, the Complaint alleges that the defendant acted negligently by failing to "child-proof" the irrigation pond after the 2000 expansion project. This alleged negligence allowed Jeremiah to place himself in the dangerous circumstance that resulted in his death.

A. The Attractive Nuisance Doctrine

The primary obstacle to this action is Jeremiah's status on the land; the plaintiffs admit that he was a trespasser. Ordinarily, the only duty that owners of land owe trespassers is to refrain from injuring them intentionally or wantonly; trespassers are not generally protected against landowner negligence.

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[2] Pl. Ans. Br. To Def. Mot. For Summ. J. at 4 ("There were two openings in the ice. Jeremiah was at the one closest to the intake pipe.").

[3] See. e.g. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

However, Delaware sometimes treats child trespassers as business invitees, who can bring a negligence action, under the doctrine of attractive nuisance. This rule, set out in *Restatement (Second) of Torts* § 339, and adopted by the Delaware Supreme Court in *Schorah v. Carey*[4], holds that an owner can be liable for injuries to children caused by dangerous, artificial conditions on his land that he should know that children, because of their age, are attracted to and unable to recognize as dangerous. The owner will be held liable, however, only if the *artificial* danger meets a five-part test:

> (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;
>
> (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
>
> (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
>
> (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
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.[5]

B. Defendant's Arguments Regarding Foreseeability and Reasonable Care

The defendant contests elements (a), (c), and (e) of this Restatement test, but the first and last arguments do not advance this Motion. It is obvious that Defendant's employees should have known, and very probably actually knew, that children trespassed upon its property. The golf course sits adjacent to a

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[4] 331 A.2d 383 (Del. 1975).

community center with numerous facilities for children, such as play parks and ball fields. Several of the defendant's employees have admitted chasing children off the course in the area of the irrigation pond.[6] The Defendant also placed "no trespassing" and "no skating" signs around the irrigation pond pointed at the community center. The record does not support a contention that Defendant was unaware of the likelihood of child trespassers.

Similarly, whether plaintiff acted with reasonable care (if there was a duty) raises fact questions not appropriate for summary judgment. Whether a split rail fence and signage adequately warned the Children not to play on the irrigation pond depends upon size, conspicuousness, wording, and surrounding circumstances. These factual nuances are best determined by a jury at trial.

C. Defendant Did Not Owe a Duty to Childproof the Irrigation Pond

Prong (c) of the Restatement test, however, presents a question of duty. As Defendant correctly points out, the attractive nuisance doctrine does not impose a duty upon landowners to protect children from all types of danger. Instead, the doctrine reaches only artificial dangers that children, due to their age, are not able

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[5] Rest. 2d Torts § 339 (emphasis added).

[6] App. To Pl. Ans. Br. on Def. Mot. For Summ. J. at 52, Dep. of David. J. Cox ("Q: What would you do when you did observe [children] in the area? A: Asked them to leave. … Q: Okay, did you escort them off the property or did you just ask them to leave and go about your business, not really knowing if they did, in fact, leave? A: We'd watch them leave the property."). *Id.* at 87, Dep. of Kevin Mayhew ("Q: Did you ever talk to people who were on your property around the irrigation pond when you saw that they were there? A: If I saw that they were there, I approached them and told them to leave the private property, yes.").

adequately to recognize and guard against. The existence of a duty is a pure question of law appropriate for summary judgment.[7]

The plaintiffs have suggested that, because the purported duty in this case arises from the attractive nuisance doctrine, and because the test for that cannon contains factual elements, the Court should forgo its traditional obligation to determine the existence of duty as a question of law in favor of allowing the jury to decide what duty the defendant owed to trespassing children. This argument is seductive, and has been followed by the Superior Court in at least one other case.[8]

This Court, however, rejects the view that a jury can properly determine duty. The problem with such a method is that landowners depend, in part, upon case law to set a standard of appropriate conduct. Two different juries considering identical or nearly identical facts are likely, or at least more likely than courts, to reach wildly different outcomes. This inherent quality of the jury system, if applied in the manner that the plaintiffs urge, would render the demands of the law regarding the still-important right to use and enjoy land perilously uncertain.

For example, if the Court were to submit the question of duty to the jury in this case, the jury might decide that this defendant owed a duty to fence its ponds so that trespassing children would find it more difficult to drown in them. Yet, a

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[7] *Kananen v. Alfred I. DuPont Institute of Nemours Foundation*, 796 A.2d 1, 4-5 (Del. Super. 2000)("In a negligence action, the existence of a duty is a question of law to be determined by the court. If the court finds that the defendant owes no duty of care to the plaintiff, the defendant is entitled to summary judgment as a matter of law.").

second jury, perhaps one comprised of more golfers, could find that a different golf course did not owe such a duty, which it would be entitled to do if duty is characterized as a question of fact. Should other golf courses take on the expense and competitive disadvantage of fencing their water traps (assuming, as seems probable, that such fences would mar the aesthetics of the course and thereby make play less enjoyable), or refrain from doing so in the hope that children will not drown, or, if they do, that the jury will be sympathetic? Insuring a risk that depends entirely upon jury caprice is simply unacceptable in the law.

Continuing this analysis, what if another child drowns in an unfenced pond on third golf course? The estate of the third child would have a reasonable argument, based on the first case, that the golf course should have known that it had a duty to fence its ponds to protect trespassing children. The golf course, however, would have a reasonable argument, based on the second case, that it had no such a duty. Would the Court then have to permit the two sides to present that decisional authority as evidence to the jury, with briefs and oral argument, to assist them in determining the conduct that the law requires of a reasonable golf course owner?

Courts determine the existence of duty in negligence cases specifically because different juries could demand different duties for similarly situated parties,

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[8] *Roberts v. Bush*, 1987 WL 8661 (Del. Super.).

thereby creating unacceptably disparate responsibilities and no consistent rules of conduct. It is simply unfair for courts to demand that parties conform their behavior to the law without providing any consistent guidance as to what the law is. The Court will therefore conduct its own analysis of whether Defendant owed a duty to childproof its irrigation pond from Jeremiah.

1. The Children Were Attracted To the Pond as a Natural Condition

One element of the attractive nuisance doctrine ripe for summary judgment is whether a condition is natural or artificial. While landowners are traditionally held liable for the latter, the law generally considers it unfair and overly burdensome to charge them with childproofing every natural danger that may be present on the land, especially bodies of water.[9] The attractive nuisance doctrine therefore applies only to artificial conditions.[10]

Defendant's irrigation pond is "artificial" in the sense that it was, at one time, excavated by mechanical means. It is also "artificial" in the sense that it has a visible pipe at the level of the pond's surface to allow water to enter from Bogey Run. Finally, it is artificial in the sense that it has underground piping to carry

[9] *See e.g. Villani v. Wilmington Housing Authority*, 106 A.2d 211 (Del. Super. 1954).
[10] *Id.*

water to other ponds on the golf course.[11]

None of these conditions, however, are what lured the Children onto the irrigation pond. The Children clearly did not care when or how the pond was excavated, whether there might be underground piping in the area, or that there was a plain metal pipe to serve as a spillway at one end. They came there to skate on ice. The question is thus whether an otherwise natural pond is an "artificial condition" solely because it was, at one time, excavated and filled with water. Phrased another way, is a man-made pond an "artificial condition" for purposes of the attractive nuisance doctrine if children were lured solely by its natural properties (its quality as a frozen pond) and not by its artificial properties (a spillway pipe).

The only logical answer to this question is "no." One can imagine numerous bodies of water in the State that are, technically, man made, but are used and appreciated by children solely for their natural qualities. The Chesapeake-Delaware canal, for example, extends 14 miles from Delaware City to Chesapeake City, Maryland, adjacent to state, federal, and private land. It would be ludicrous, however, to hold adjacent landowners liable for trespassing children who may be

[11] This condition is particularly important in describing the scope of Defendant's duty. Because the underground pipes are also attached to all the water traps on Defendant's golf course, a holding that the underground piping causes the irrigation pond to be an artificial condition within the meaning of the attractive nuisance doctrine would imply that Defendant owes a duty to childproof all of its water traps, including those in the field of play.

"lured" into swimming in the Canal's fast moving waters, and subsequently drown. This is despite the fact that the Canal has many pipes running into it and was entirely man made.[12]

In *Beaston v. James Julian, Inc.*, the Superior Court held that the doctrine of attractive nuisance is not invoked unless the Complaint alleges that it was the artificial condition that lured the child onto the land.[13] This view has since fallen into disfavor,[14] but the idea that landowners need only protect children from artificial conditions that actually attract them remains in other contexts. In *Villani v. Wilmington Housing Authority*, the Superior Court granted summary judgment for defendants when a child wandered out of her housing complex onto a neighbor's land and drowned in a stream.[15] The *Villani* court found that it would

[12] This analysis is slightly skewed in the Canal itself is owned and operated by Army Corps of Engineers. However, wide swaths of the Canal's banks are also owned by ACOE, which permits recreational activities such as fishing and cycling on its land. The banks are, of course, unfenced, despite the obvious lure for children.

[13] 120 A.2d 317, 319 (Del. Super. 1956), In *Beaston*, the child entered the land because she wanted to play in what appeared to be an open field. The child subsequently discovered a sewer trench, fell in, and drowned. The Court held that the landowner must be held to the general negligence standard, rather than the higher standard imposed by the attractive nuisance doctrine, because the artificial condition did not "attract" the child.

[14] This view holds with Justice Holmes' majority opinion in *United Zinc & Chemical Co. v. Britt*, 255 U.S. 268 (1922). The logic behind Britt is that even children should not trespass, but may be tempted by an attractive nuisance visible to them from beyond the bounds of the land. If the child is merely trespassing for no reason, however, and stumbles across an alluring danger, the "temptation as invitation" logic breaks down, and the landowner should not be liable. Most commentators consider *Britt* to have been overruled by *Best v. District of Columbia,* 291 U.S. 411 (1934), even though that opinion does not expressly state an intent to overrule. The drafters of the Restatements did not include the "allurement" requirement, and it has subsequently fallen into disfavor, although it remains in a minority of jurisdictions, *see e.g. Kelly v. Ladywood Apartments,* 622 N.E.2d. 1044, FN 3 (Ind. App. 1993).

[15] 106 A.2d 211.

be unreasonable to expect a defendant to fence or guard a body of water in which nothing artificial had lured the child.[16]

In this case, the Children went to play on a frozen pond. They did not go to play on the spillway pipe, nor did the pipe cause Jeremiah's injuries in a manner analogous to the traditional railroad turntable cases.[17] The record does not indicate that the pipe caused the ice to break in an artificial manner, i.e. more than a natural outflow such as a brook would have done. Plaintiffs admit that there was also a hole in the ice at the other end of the pond at the time of the accident.[18] In short, Jeremiah fell through ice while skating exactly as he could have done on one of the many natural bodies of water that dot the White Clay Creek area of Newark.

This question of artificialness really comes down to whether Defendant's irrigation pond is more akin to a swimming pool or to a natural body of water. Delaware law plainly requires that swimming pools be childproofed,[19] but just as plainly absolves landowners from a duty to childproof natural waters absent some

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[16] *Id.* at 457.

[17] *See e.g. Sioux City & Pacific R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 21 L.Ed. 745 (1873).

[18] *Supra* Note 2.

[19] *See e.g.* New Castle County Ordinance No. 78-143: 428.8.2 ("Swimming pool safety devices: Every person owning land on which there is situated a Swimming pool, which contains twenty-four (24) inches or more of water in depth at any point, shall erect and maintain thereon an adequate enclosure either surrounding the property or pool area, sufficient to make such body of water inaccessible to small children. Such enclosure, including gates therein, must be not less than four (4) feet above the underlying ground; all gates must be self-latching with latches placed four (4) feet above the underlying ground or otherwise made inaccessible from the outside to small children.").

artificial quality that serves to lure the child.[20] It is the Court's opinion that, in this context, the irrigation pond served in all material respects as a natural body of water and was treated as such by the Children. There is therefore no reason to impose upon Defendant a higher duty of care than it was required to exert over any other natural body of water, or to hold the irrigation pond to be "artificial" for the purposes of the attractive nuisance doctrine.[21]

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[20] *Villani*, 106 A.2d 211. Plaintiffs have also cited Pond Code 378, published by the United States Natural Resource Conservation Service, as an alternative source of duty. The Pond Code required Defendant to consider "appropriate safety measures, such as warning signs, rescue facilities, fencing, etc." Reliance on this provision is misplaced for many reasons. First, Plaintiffs have made no showing that § 378 applied to this Pond. The City of Newark has averred that it is responsible for determining compliance with applicable State and Federal regulations for pond projects in its jurisdiction. Def. Reply Br., Ex. A. The City approved this project by issuing a permit, and determined that the provisions of the Federal and State codes invoked by the plaintiffs did not apply, presumably because the project was too small. Moreover, it is clear that Defendant *did* consider appropriate fencing and signage. The Children admit that they climbed over a split rail fence and ignored numerous signs in order to get to the pond.

[21] The Court agrees with the reasoning of the Washington Supreme Court in *Ochampaugh v. City of Seattle*, 588 P.2d 1351, 1358 (Wash. 1979), a case nearly identical to this one. In *Ochampaugh*, a six-year-old and an eight-year-old were specifically warned by their father not to play unsupervised in a nearby pond. The pond was artificially excavated by the defendant's predecessor for an unknown purpose, but served as a well-known recreational spot at the time of the accident. The children ignored their father's warning, found a raft that other bathers had left, floated to the middle of the pond, fell in, and drowned. In refusing to find liability, the Washington Supreme Court held, "Natural bodies of water, *or artificially formed bodies of water which have the characteristics of natural bodies*, do not constitute dangers which come within the doctrine of 'attractive nuisance' for a number of reasons. While they are undoubtedly alluring to children, their dangers are open and apparent, and easily avoidable, and it is reasonable to expect that children too young to appreciate the danger will be protected from them by their parents or other custodians. While they involve a possibility of injury or death, they do not present a likelihood or probability of such harm. And it is generally not reasonably practical or

2. <u>Falling Through Ice Is an Obvious Risk That Children Understand</u>

"Bodies of water, especially natural water courses …, are not subject to the attractive nuisance doctrine, in the absence of some unusual condition or artificial feature other than the mere presence of the water. This rule has been applied also to artificial bodies of water".[22] The reason is simple. A landowner "is free to rely upon the assumption that any child of sufficient age to be allowed at large by his parents, and so to be likely to trespass, will appreciate [obvious] danger[s] and avoid [them] … The danger to which such a fixed rule most often has been applied is that of drowning in water."[23] In other words, courts generally do not expect landowners to foresee children hurling themselves off the tops of buildings, into bonfires, or into water out of their depth, because such dangers are readily understood by any child old enough to leave the home unsupervised.

Unlike many other states, Delaware has not established a hard and fast rule prohibiting recovery under the attractive nuisance doctrine if the danger involved is fire, water, or falling from a height.[24] Instead, each case must be considered on its particularized facts.[25] This individualized consideration allows courts to permit cases to proceed if the child may have been expected to recognize part of the risk

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feasible either to prevent access to such bodies of water or to render them innocuous without obstructing the uses and functions which they serve."(emphasis added).

[22] *Villani*, 106 A.2d at 215.

[23] *PROSSER, LAW ON TORTS*, 4TH edition, Ch. 10, § 59, pp. 371-2.

[24] *Roberts*, 1987 WL 8661.

[25] *Id.*

(falling) but not another (a nearby sharp object), and therefore failed to appreciate the risk as a whole.[26]

This does not necessarily mean, however, that there are no types of danger that a reasonable child cannot be expected to appreciate, or that courts should not grant summary judgment in such a case. The attractive nuisance doctrine is meant only to protect children from dangers that they cannot fully and meaningfully understand, and not from dangers they choose to encounter while aware of the risks, because of reckless bravado or foolishness to a level below that of a reasonable child.[27]

For example, in *Roberts v. Bush*, two children drowned in the defendant's

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[26] *Schorah*, 331 A.2d at 385.

[27] *See e.g. Long v. Manzo*, 682 A.2d 370, 375-6 (Pa. Super. 1996); *see also* Restatement (Second) Torts § 339, Comment (h) ("The duty of the possessor, therefore, is only to exercise reasonable care to keep the part of the land upon which he should recognize the likelihood of children's trespassing free from those conditions which, though observable by adults, are likely not to be observed by children, or which contain the risks the full extent of which an adult would realize but which are beyond the imperfect realization of children. It 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. This limitation of the possessor's liability to conditions dangerous to children, because of their inability to appreciate their surroundings or to realize the risk involved, frees the possessor of land from the liability to which he would otherwise be subjected by maintaining on the land the normal, necessary and usual implements which are essential to its normal use, but which reckless children can use to their harm in a spirit of bravado or to gratify some other childish desire and with as full a perception of the risks which they are running as though they were adults.").

swimming pool.[28] One of the children had license to use the pool, which had a diving board, as long as he did not swim alone; the other was a trespasser. Judge (now Justice) Ridgely declined to adopt the bright line rule barring attractive nuisance claims involving water, in favor of a fact-specific analysis. The facts of that case included that the defendant had known for years of neighborhood children swimming in her pool without permission. The only action she ever took to prevent them from doing so was repeatedly to restate her rules of no swimming alone, and no guests without permission, which the neighborhood children continually disregarded. The Court found that, under those circumstances, there was a question of fact as to whether the drowned children appreciated the risk of swimming in a pool.

This case is far different from *Roberts*. There is no evidence that Defendant ever gave any child license to play in the irrigation pond, or that it stood by indifferently when it discovered children doing so illegally.[29] The irrigation pond is also not like a swimming pool, i.e. a concrete and tile structure designed solely for recreational use, but rather a pond, natural in appearance with an industrial purpose (irrigation), and a limited recreational purpose (a water trap). It has never been used for the types of recreational activity that may be dangerous to children,

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[28] 1987 WL 8661.

[29] Plaintiffs' response to this motion quotes numerous deposition excerpts where Defendant's employees admit chasing children away from the irrigation pond whenever they were found there. *Supra Note 6*.

such as swimming or skating. There is thus no evidence that the Children were lured into a false sense that the pond was not dangerous, as the *Roberts* children may have been. This is especially true because Stephanie Butler specifically warned the Children of the danger, but they ignored her, as well as numerous posted warnings surrounding the irrigation pond. Again, as the Restatement indicates, "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 none the less chooses to encounter it".[30]

On the facts of this case, the irrigation pond presented no danger other than the fact that it was comprised of water, and that water was frozen in winter. As already stated, water is a danger that a reasonable landowner can expect children to

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[30] Restatement (Second) of Torts § 339, Comment (m). In fact, this risk is identical to two examples the Restatement offers to show when a landowner owes no duty. Restatement (Second) of Torts § 339, Illustration 6 ("A has on his land a small artificial pond in which, to A's knowledge, children of the neighborhood frequently trespass and swim. A takes no precautions of any kind. B, a boy ten years old who cannot swim, trespasses on A's land, enters the pond, and is drowned. A is not liable to B."). Restatement (Second) of Torts § 339, Illustration 8 ("The A Railroad Company maintains upon its land an unlocked turntable, upon which, as it knows, children of the neighborhood frequently trespass, and which involves an unreasonable risk of harm to such children. On two occasions B and C trespass upon the land, play with the turntable, and each is injured when his foot is caught in it. B is a boy sixteen years of age, whose maturity and experience make him fully understand and appreciate the danger. C is a boy nine years of age, who is the son of a railroad engineer, has been repeatedly warned against the turntable, and likewise fully appreciates the danger. A Railroad is not liable to B or to C.").

understand.[31] Other jurisdictions have held that the water being frozen does not change this general rule.[32] This holding makes sense as falling through ice is a danger even more commonly recognized than drowning in "safe" water such as a swimming pool, as evidenced, for instance, by the Children taking pains to test the ice before playing on the irrigation pond. Jeremiah's decision to run across an area of untested ice, probably in response to a dare from his cousin, was, as a matter of law, a willful choice to encounter a known danger that fell below the standard of a reasonable child. As such, Defendant had no duty to prevent it, and Plaintiffs cannot establish element (c) of the attractive nuisance test.

Conclusion

This case presents a genuine tragedy: the unexpected and unnecessary death of a small child. It also serves as a reminder that a terrible occurrence does not automatically mean that someone else is to blame, and that, at least in some instances, a child's behavior remains the responsibility of his parents and of the

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[31] *Supra* Note 20; *see also* Restatement (Second) of Torts § 339, Comment (j) ("There are many dangers, such a those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large. To such conditions the rule stated in this Section ordinarily has no application, in the absence of some other factor creating a special risk that the child will not avoid the danger, such as the fact that the condition is so hidden as not to be readily visible, or a distracting influence which makes it likely that the child will not discover or appreciate it."); *Id.* at Illustration 6 ("A has on his land a small artificial pond in which, to A's knowledge, children of the neighborhood frequently trespass and swim. A takes no precautions of any kind. B, a boy ten years old who cannot swim, trespasses on A's land, enters the pond, and is drowned. A is not liable to B.").

[32] See e.g. *Charles F. Smith & Son, Inc.*, 560 A.2d 1130 (Md. 1989); *Hawkins v. Houser*, 371 S.E. 2d 297 (N.C. App. 1988); *Fin v. Newsam*, 709 S.W. 2d 889 (Mo. App. 1986).

child himself. Because the irrigation pond in question was not an artificial condition within the meaning of the Restatement, and comprised a danger that children should reasonably understand, it was not an attractive nuisance. Because the irrigation pond was not an attractive nuisance, Defendant owed no duty of care to the trespassing decedent, and cannot be held liable for his death. Summary Judgment for Defendant is therefore **GRANTED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary – Civil
cc: Joseph J. Rhoades, Esquire
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