

ANSWER TO QUESTION NO. 3

Premises Liability: A landowner's duty to a visitor depends on that visitor's status. Michigan recognizes three common-law categories of persons who enter upon the land or premises of another: invitee, licensee and trespasser. *Stitt v Holland Abundant Life*, 462 Mich 591, 596 (2000). An invitee is a person who enters upon the land of another upon an invitation. *Id.* A licensee is a person who is privileged to enter the land of another by virtue of the possessor's consent. *Id.* And a trespasser is a person who enters upon another's land without the landowner's consent. *Id.*

Blackacre was not open to the public. D & D posted "No Trespassing" signs and notified abutting landowners through the mail that Blackacre was private property. D & D neither expressly nor implicitly invited Chris onto its property, nor consented to his entry onto its land. Therefore, Chris was a trespasser.

A landowner owes no duty of care to an undiscovered trespasser except to refrain from injuring him by willful and wanton misconduct. *Id.* Willful and wanton misconduct requires an intent to harm or such indifference to whether harm will result as to be the equivalent of a willingness that it does. *Burnett v City of Adrian*, 414 Mich 448, 455-456 (1982); *James v Leco Corp*, 170 Mich App 184, 193 (1988). Nothing in the facts provided suggests that D & D intended that the dirt piles would cause harm or exhibited such indifference as to be equivalent to a willingness that harm would occur to anyone. The dirt piles alone were not inherently dangerous and even Amber did not believe that they or her child's activity on them was dangerous. Moreover, D & D did not have any notice that the children were digging holes in the dirt piles prior to the accident. It does not appear that Amber's premises liability claim is very strong.

Attractive Nuisance: The doctrine of attractive nuisance imposes liability on landowners for injuries suffered by trespassing children. Michigan has adopted the five-part test from 2 Restatement Torts, 2d, §339, p 197:

"A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

"(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

"(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, and

"(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

"(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

"(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children." *Murday v Bales Trucking, Inc.*, 165 Mich App 747, 751-752 (1988).

In order for a possessor of land to be held liable for injury to a trespassing child, all five conditions must be met. *Id.* at 752. "The term 'attractive nuisance' is a misnomer (or historical leftover) because it is not necessary, in order to maintain such an action, that the hazardous condition be the reason that the children came onto the property." *Pippin v Atallah*, 245 Mich App 136, 146 fn 3 (2001). Elements (a) and (c) appear to favor Amber, while elements (d) and (e) may require development before they can be resolved in favor of either party. However, it appears unlikely that plaintiff will be able to establish element (b). The dirt piles alone did not involve an unreasonable risk of death or serious bodily harm. The dirt piles were only made dangerous by Chris' digging. Moreover, it is certainly arguable that Chris' digging did not create an unreasonable risk of death or serious bodily harm; even his mother, Amber, saw Chris digging and did not believe that he was-in any danger.

Element (b) also poses a problem for Amber because D & D did not and had no reason to know about the danger created by Chris' digging. This is a critical point because whether the danger was created by Chris or D & D is irrelevant. *Id.* p 143. D & D is responsible for a condition only if it knows or has reason to know that it existed. *Id.* Because D & D was not at the property after Chris dug the holes, it did not know or have any reason to know about the dangerous condition that Chris created. *Id.* Accordingly, it is unlikely that Amber can establish element (b).

Amber, therefore, is unlikely to recover in tort under either of her theories of recovery.