

**FEBRUARY 2016 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES**

EXAMINERS' ANALYSIS OF QUESTION NO. 1

Issue

This question raises the issue of whether Michigan Builders is liable for the boy's injuries under an attractive nuisance theory.

Rule

A motion for summary disposition should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross Peters & Co*, 451 Mich 358 (1996).

In *Bragan v Symanzik*, 263 Mich App 324, 328 (2004), the court explained that:

Landowners owe a heightened duty of care to known child trespassers. Normally, the only duty owed to a trespasser is to refrain from wanton and willful misconduct. Pursuant to the attractive nuisance doctrine, however, the landowner is liable for harm caused by a dangerous artificial condition located where children are known to trespass if children would not likely realize the danger and the owner fails to use reasonable care to eliminate a danger whose burden outweighs its benefit.

Michigan courts have adopted the test set forth by the Restatement of Torts 2d, §339. See *Pippin v Atallah*, 245 Mich App 136, 146 n 4 (2001), which provides that a premises owner is

liable for injuries to a reasonably foreseeable trespassing child if the following factors are established by the facts:

(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.

"At the onset, liability under this rule is imposed only where the injury is caused by an 'artificial condition.'" *Murday v Bales Trucking, Inc*, 165 Mich App 747, 752 (1988).

Analysis

In reviewing the above factors, the applicant should conclude that plaintiff will likely be successful in proving each of the elements. With respect to (a), there is no doubt that Michigan Builders (through its foreman) knew that children were accessing the property, in particular making caves in the dirt hill, and were not permitted on the property. It is also clear that Michigan Builders knew, or minimally should have known, that creating these caves involved an unreasonable risk of death or serious injury. In fact, the foreman told the children to get off the property, and though he did not warn the boys of the dangers, one could argue the foreman's comments and actions create the implication that he knew it was dangerous for the boys to be making the caves. Thus, (b) is satisfied.

The action of these young elementary age children in coming back to the dirt pile and creating another cave, even in spite of the warning, satisfies section (c). Whether (d) is satisfied is more debatable. There are no facts describing the burden to remove the dirt, but one can presume that such a large pile would be expensive to move, and the facts say that much of the dirt will be used as 'fill dirt" once the cement settles. Thus, there is a good argument that removing the dirt pile would be burdensome. Additionally, it could be argued that it would not have been burdensome to install a fence around the pile and hole. But, even if removal of the dirt or placing a fence around the perimeter was burdensome, the risk of injury to the children in building additional caves was substantial. Although nothing reveals any prior injuries or accidents from such conduct or from the existence of the dirt pile, the risk of a cave-in was significant given that they were digging at the base of a 15-foot high pile of dirt. Factor (d) is satisfied.

Finally, the evidence also satisfies section (e). The placement of a sign telling elementary age children to not trespass is a de minimis attempt to cure the known problem. Michigan Builders could have easily placed a secure tarp over the pile, reduced its size, or placed a guard on the premises to ward off any potential trespassers until the dirt was reused in a week.

Conclusion

The applicant should conclude that the motion to dismiss should be denied because the evidence satisfies the elements necessary to establish that Michigan Builders created an attractive nuisance on its property.